



APPENDIX

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 <p style="text-align: center;"> Administrative Policies And Procedures Tennessee Supreme Court Administrative Office of the Courts <i>William M. Barker</i> </p>	Index #: 2.02	Page 1 of 2
	Effective Date: 05/01/06	
	Supersedes: 2.02 (11/01/01) 	
Approved by: Chief Justice William M. Barker and Randy C. Camp, Director		
Subject: Equal Employment Opportunity		

- I. Authority: Title VII of the Civil Rights Act of 1964; T.C.A. §16-3-803; T.C.A. Title 4, Chapter 21, Parts 1 and 4; Equal Pay Act of 1963; Age Discrimination in Employment Act of 1967; Americans' with Disabilities Act of 1990; T.C.A. §8-50-103(a) and §8-50-104; Pregnancy Discrimination in Employment Act; Vocational Rehabilitation Act of 1973; Uniformed Services Employment and Reemployment Act of 1994; Tennessee Human Rights Act.
- II. Purpose: To ensure that all individuals have equal employment opportunity.
- III. Application: To all state judges and paid or unpaid employees of the state court system who work or serve in a full-time or part-time status. For purposes of this policy, "employee" also includes all members of the state judicial committees, boards and commissions when acting in that capacity.
- IV. Definition:
 - A. Discriminatory Practices: Discriminating in any aspect of employment, including:
 1. Hiring and firing;
 2. Compensation, assignment, or classification of employees;
 3. Transfer, promotion, layoff, or recall;
 4. Job advertisements;
 5. Recruitment;
 6. Testing;
 7. Use of facilities;
 8. Training and apprenticeship or clerkship programs;
 9. Benefits;
 10. Pay, retirement plans and disability leave;

11. Other terms and conditions of employment;
 12. Retaliation against an individual for filing a charge of discrimination, participating in an investigation, or opposing discriminatory practices;
 13. Employment decision based on stereotypes or assumptions about the abilities, traits, or performance of individuals of a certain sex, national origin, religion, age, veteran status, disability, or race; and
 14. Denying employment opportunities to a person because of marriage to, or association with, an individual of a particular national origin, religion, age, veteran status, disability, or race.
- B. Retaliation: Overt or covert acts of reprisal, interference, restraint, penalty, discrimination, or intimidation against an individual or individuals exercising rights under this policy.
- V. Policy: It is the policy of the judicial branch to promote equal employment opportunity for all judicial branch employees and applicants for employment.
- VI. Procedures:
- A. A copy of this policy will be circulated to all employees and be displayed conspicuously in all facilities.
 - B. A copy of this policy will be given to all new judicial branch employees as a part of orientation.
 - C. All recruitment sources will be notified in writing of the policy.
 - D. It is the responsibility of every member of management to do their part in preventing all forms of discrimination.
 - E. Employees who believe they have been discriminated against should contact Human Resources or any member of management. In addition, employees may contact the EEOC at 1-800-669-4000 (voice) or 1-800-669-6820 (TTY) or the Tennessee Human Rights Commission at 615-741-5825 for information on specific procedures for filing a complaint. The employee also may file a lawsuit in a court of competent jurisdiction.

(Rule 1500-1-.10, continued)

be authorized by the Tennessee Human Rights Commission where it is necessary for authenticity or genuineness, such as for an actor or actress, or for fitters of intimate apparel.

- (6) Any employer, labor organization, or employment agency may make an inquiry of the Tennessee Human Rights Commission at its office in Nashville as to whether religion, national origin, or sex is a bona-fide occupational qualification for a particular job advertisement or notice that it intends to cause to be published, printed, circulated or displayed. The Tennessee Human Rights Commission shall, within five (5) working days, give opinions in response to such inquiries. An opinion rendered by the Commission prior to the publication or display of any advertisement in response to such an inquiry shall be binding on the Commission for the purpose of this regulation, except in those instances in which the inquiry has not fully and accurately disclosed the relevant facts regarding the particular job in question. The Commission shall maintain records of each inquiry made pursuant to this section, including the name, title, and address of the inquirer, a summary of the job and job duties, the basis for the exception claimed, and the time, date, identification number, and disposition of the inquiry.
- (7) Newspapers and other publications which print employment advertisements are encouraged to maintain lists of discriminatory terms and permissible substitutes and to instruct their employees to advise employers, labor organizations, or employment agencies of these terms and to have copies of these regulations available for distribution to advertisers upon request.
- (8) The use of language including, but not limited to, "black", "negro", "colored", "white", "restricted", "interracial", "segregated", "Christian", "Jewish", "men", "women", or any other word, term, phrase, or expression which tends to influence, persuade, dissuade, encourage, discourage, attract, or repel any person or persons because of their race, color, religion, national origin, or sex shall be considered a discriminatory practice in violation of Tennessee Code Annotated, Title 4, Chapter 21.
- (9) Nothing contained in this regulation shall be deemed to prohibit the Commission from including in any of its orders against any respondent employer, labor organization, or employment agency a provision requiring such respondent to include in any advertisement or notice regarding any employment or licensing opportunity the term "equal opportunity", or any substantially similar term, in any notice or advertisement.

Authority: T.C.A. §4-21-202. **Administrative History:** Original rule filed December 5, 1978; effective January 19, 1979. Amendment filed June 18, 2003; effective October 28, 2003.

1500-1-.11 INCORPORATION OF FEDERAL GUIDELINES AND REGULATIONS.

- (1) The guidelines on religious discrimination promulgated by the United States Equal Employment Opportunity Commission, which appear in 29 Code of Federal Regulation Part 1605, are adopted, as hereinafter amended, and are incorporated by reference.
- (2) The guidelines on sex discrimination promulgated by the United States Equal Employment Opportunity Commission, which appear in 29 Code of Federal Regulations Part 1604, are adopted, as hereinafter amended, and are incorporated by reference.
- (3) The guidelines on employment testing issued by the United States Equal Employment Opportunity Commission, which appear in 29 Code of Federal Regulations Part 1607, are adopted, as hereinafter amended, and are incorporated by reference.
- (4) The regulations on discriminatory housing advertisements issued by the United States Department of Housing and Urban Development, which appear in 24 Code of Federal Regulations Part 100.75, are adopted, as hereinafter amended, and are incorporated by reference.

(Rule 1500-1-.11, continued)

- (5) Any federal guideline or regulation adopted and incorporated under this part that is inconsistent with the Tennessee Human Rights Act, or any regulation promulgated thereunder, shall be superseded by the Tennessee Human Rights Act or the appropriate regulation promulgated thereunder.

Authority: T.C.A. §4-21-202. **Administrative History:** Original rule filed December 5, 1978; effective January 19, 1979. Amendment filed June 18, 2003; effective October 28, 2003.

U.S. Census Bureau

State & County QuickFacts

Shelby County, Tennessee**People QuickFacts**

Shelby County	Tennessee
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Population, 2005 estimate	909,035	5,962,959
Population, percent change, April 1, 2000 to July 1, 2005	1.3%	4.8%
Population, 2000	897,472	5,689,283
Population, percent change, 1990 to 2000	8.6%	16.7%
Persons under 5 years old, percent, 2004	7.7%	6.5%
Persons under 18 years old, percent, 2004	27.3%	23.6%
Persons 65 years old and over, percent, 2004	9.8%	12.5%
Female persons, percent, 2004	52.1%	51.1%
White persons, percent, 2004 (a)	46.1%	80.7%
Black persons, percent, 2004 (a)	50.9%	16.8%
American Indian and Alaska Native persons, percent, 2004 (a)	0.2%	0.3%
Asian persons, percent, 2004 (a)	1.9%	1.2%
Native Hawaiian and Other Pacific Islander, percent, 2004 (a)	0.0%	0.0%
Persons reporting two or more races, percent, 2004	0.9%	0.9%
Persons of Hispanic or Latino origin, percent, 2004 (b)	3.2%	2.8%
White persons, not Hispanic, percent, 2004	43.2%	78.1%
Living in same house in 1995 and 2000, pct age 5+, 2000	51.2%	53.9%
Foreign born persons, percent, 2000	3.8%	2.8%
Language other than English spoken at home, pct age 5+, 2000	6.5%	4.8%
High school graduates, percent of persons age 25+, 2000	80.8%	75.9%
Bachelor's degree or higher, pct of persons age 25+, 2000	25.3%	19.6%
Persons with a disability, age 5+, 2000	168,706	1,149,693
Mean travel time to work (minutes), workers age 16+, 2000	23.7	24.5
Housing units, 2004	384,367	2,595,060
Homeownership rate, 2000	63.1%	69.9%
Housing units in multi-unit structures, percent, 2000	28.4%	18.7%
Median value of owner-occupied housing units, 2000	\$92,200	\$93,000
Households, 2000	338,366	2,232,905
Persons per household, 2000	2.60	2.48
Per capita money income, 1999	\$20,856	\$19,393
Median household income, 2003	\$39,099	\$37,925

LEXSEE 2006 TENN. LEXIS 900

JAMES KILLINGSWORTH, ET AL. V. TED RUSSELL FORD, INC.

No. E2004-02597-SC-R11-CV

SUPREME COURT OF TENNESSEE, AT KNOXVILLE

2006 Tenn. LEXIS 900

September 7, 2006, Session
October 13, 2006, Filed

PRIOR HISTORY: [*1] Tenn. R. App. P. 11; Judgment of the Court of Appeals Affirmed. Appeal by permission from the Court of Appeals, Eastern Section. No. 1-149-00. Dale C. Workman, Judge. *Killingsworth v. Ted Russell Ford, Inc.*, 2006 Tenn. App. LEXIS 8 (Tenn. Ct. App., Jan. 5, 2006)

DISPOSITION: Judgment of the Court of Appeals Affirmed.

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff consumers brought a successful action, under the Tennessee Consumer Protection Act of 1977 (TCPA), *Tenn. Code Ann. § § 47-18-101 to -125* (2001), against defendant car dealership. The Tennessee Court of Appeals entered a judgment awarding the consumers attorney fees. Review was granted.

OVERVIEW: The action arose when the consumers discovered their new car, which they had bought from the dealership, had suffered pre-sale damage. At issue on appeal was whether the consumers could be awarded attorney's fees. The consumers argued, on appeal, that the TCPA permitted an award of attorney's fees for appellate work. They also contended that the request for such fees need not be made until after the appeal succeeded. The consumers reasoned that a defendant was put on sufficient notice that such fees could be sought upon remand by the reference to the statute in the complaint. The dealership asserted that even if such fees were recoverable, the consumers did not make a timely request for them and that the intermediate appellate court erred in increasing the award of trial-level attorney's fees. The supreme court determined that a plaintiff who established a violation of one or more of the provisions of the TCPA could be awarded reasonable attorney's fees generated during appeal. In this case, however, consumers

failed to request the fees in their appellate pleadings in a timely fashion. Finally, there was no error in the award of trial-level attorney fees.

OUTCOME: The supreme court affirmed the judgment of the Tennessee Court of Appeals.

CORE TERMS: trial-level, fees incurred, intermediate, time spent, Tennessee Consumer Protection Act, public accommodations, award of attorney, actual damages, consumer, remedial, pursuing, unfair, recoverable, legitimate business, deceptive acts, legal services, set forth, humiliation, authorize, construe, commerce, housing, preparing, notice

LexisNexis(R) Headnotes

Civil Procedure > Appeals > Standards of Review > De Novo Review

Evidence > Inferences & Presumptions > Presumptions Governments > Legislation > Interpretation

[HN1] Issues of statutory construction are questions of law which the supreme court reviews de novo with no presumption of correctness accorded the trial court's conclusions. When interpreting statutes, the supreme court must ascertain and give effect to the legislative intent without restricting or expanding the statute's intended meaning or application.

Antitrust & Trade Law > Consumer Protection > Deceptive Acts & Practices > State Regulation

Civil Procedure > Remedies > Damages > General Overview

[HN2] See *Tenn. Code Ann. § 47-18-109(a)(1)* (2001).

Antitrust & Trade Law > Consumer Protection > Deceptive Acts & Practices > State Regulation

Civil Procedure > Remedies > Costs & Attorney Fees > Attorney Expenses & Fees > General Overview

Civil Procedure > Remedies > Damages > General Overview

Civil Procedure > Remedies > Damages > Compensatory Damages

Civil Procedure > Remedies > Damages > Punitive Damages

[HN3] Actions under the Tennessee Consumer Protection Act of 1977 (TCPA), *Tenn. Code Ann.* § § 47-18-101 to -125 (2001), may be brought in a court of competent jurisdiction, and a court may award three times the actual damages sustained where the court finds the defendant's conduct was a willful or knowing violation of the TCPA. In addition to actual and punitive damages, the TCPA provides that, upon a finding by the court that a provision of the TCPA has been violated, a court may award to the person bringing such action reasonable attorney's fees and costs.

Antitrust & Trade Law > Consumer Protection > Deceptive Acts & Practices > State Regulation

Civil Procedure > Remedies > Costs & Attorney Fees > Attorney Expenses & Fees > Statutory Awards

Governments > Legislation > Interpretation

[HN4] The Tennessee General Assembly has instructed Tennessee's courts to construe the provisions of the Tennessee Consumer Protection Act of 1977 (TCPA), *Tenn. Code Ann.* § § 47-18-101 to -125 (2001), "liberally" so as "to promote," *inter alia*, the protection of consumers and legitimate business enterprises from those who engage in unfair or deceptive acts or practices in the conduct of any trade or commerce in part or wholly within Tennessee. *Tenn. Code Ann.* § 47-18-102(2) (2001). The Act further provides that, because it is deemed remedial legislation necessary for the protection of the consumers of the state of Tennessee and elsewhere, it shall be construed to effectuate its purposes and intent. *Tenn. Code Ann.* § 47-18-115 (2001). The supreme court has previously recognized that the TCPA is remedial, rather than regulatory, in nature.

Civil Procedure > Appeals > Costs & Attorney Fees

[HN5] In Tennessee, legislative provisions for an award of reasonable attorney's fees need not make a specific reference to appellate work to support such an award where the legislation has broad remedial aims.

Antitrust & Trade Law > Consumer Protection > Deceptive Acts & Practices > State Regulation

Civil Procedure > Remedies > Costs & Attorney Fees > Attorney Expenses & Fees > General Overview

Civil Procedure > Remedies > Costs & Attorney Fees > Attorney Expenses & Fees > Statutory Awards

[HN6] The Consumer Protection Act of 1977 (TCPA), *Tenn. Code Ann.* § § 47-18-101 to -125 (2001), should be construed so as to allow an award of reasonable attorney's fees generated during an appeal.

Antitrust & Trade Law > Consumer Protection > Deceptive Acts & Practices > State Regulation

Civil Procedure > Remedies > Costs & Attorney Fees > Attorney Expenses & Fees > General Overview

Civil Procedure > Remedies > Costs & Attorney Fees > Attorney Expenses & Fees > Statutory Awards

Civil Procedure > Appeals > Costs & Attorney Fees

[HN7] The Consumer Protection Act of 1977 (TCPA), *Tenn. Code Ann.* § § 47-18-101 to -125 (2001), allows an award of attorney's fees to a plaintiff only where the trial court has found that one of the Act's provisions has been violated. *Tenn. Code Ann.* § 47-18-109(e)(1). If an appeal ensues, a wronged plaintiff's monetary judgment is at risk of being consumed by the resulting appellate attorney's fees unless they are also subject to being awarded. A plaintiff successful at trial is therefore at risk of being de-remedied if unable to collect his or her reasonable appellate legal fees.

Antitrust & Trade Law > Consumer Protection > General Overview

Antitrust & Trade Law > Consumer Protection > Deceptive Acts & Practices > State Regulation

Civil Procedure > Appeals > Costs & Attorney Fees

[HN8] A plaintiff may be awarded reasonable attorney's fees incurred during an appeal on a claim brought under the Tennessee Consumer Protection Act of 1977 (TCPA), *Tenn. Code Ann.* § § 47-18-101 to -125 (2001), where one or more of the TCPA's provisions has been violated.

Civil Procedure > Appeals > Costs & Attorney Fees

[HN9] When a party is seeking attorney fees incurred on an appeal, that request, absent any statute or rule directing otherwise, must be directed first to the appellate court in a timely fashion.

Civil Procedure > Appeals > Briefs

Civil Procedure > Appeals > Costs & Attorney Fees

Civil Procedure > Appeals > Remands

[HN10] Tennessee's rules of appellate procedure require an appellant to set forth in his or her brief a statement of

the issues presented for review. Tenn. R. App. P. 27(a)(4) (2006). A claim for appellate attorney's fees is an issue that should be set before the appellate court because a remand to the trial court is not a foregone conclusion. Also, Tenn. R. App. P. 27(a)(8) provides that an appellant's brief shall contain a short conclusion, stating the precise relief sought. Tenn. R. App. P. 27(a)(8). An award of attorney's fees generated in pursuing the appeal is a form of relief; the rule requires it to be stated.

***Antitrust & Trade Law > Consumer Protection > Deceptive Acts & Practices > State Regulation
Civil Procedure > Appeals > Briefs***

Civil Procedure > Appeals > Costs & Attorney Fees

[HN11] A plaintiff seeking to recover reasonable attorney's fees generated during an appeal of a case brought under the Tennessee Consumer Protection Act of 1977 (TCPA), *Tenn. Code Ann. § § 47-18-101 to -125* (2001), must set forth his or her intention to do so in his or her appellate pleadings.

Antitrust & Trade Law > Consumer Protection > Deceptive Acts & Practices > State Regulation

Civil Procedure > Remedies > Costs & Attorney Fees > Attorney Expenses & Fees > General Overview

Civil Procedure > Remedies > Costs & Attorney Fees > Attorney Expenses & Fees > Statutory Awards

Civil Procedure > Appeals > Costs & Attorney Fees

[HN12] A plaintiff who establishes a violation of one or more of the provisions of the Tennessee Consumer Protection Act of 1977 (TCPA), *Tenn. Code Ann. § § 47-18-101 to -125* (2001), may be awarded reasonable attorney's fees generated during appeal(s) of the matter. In order to be awarded such fees, a plaintiff must initially request them in his or her appellate pleadings in a timely manner.

COUNSEL: J. Myers Morton and George W. Morton, Jr., Knoxville, Tennessee, for the appellants James Killingsworth and Kathy Killingsworth.

J. Douglas Overbey and Daniel R. Pilkington, Knoxville, Tennessee, for the appellee, Ted Russell Ford, Inc.

JUDGES: CORNELIA A. CLARK, J., delivered the opinion of the court, in which WILLIAM M. BARKER, C.J., AND JANICE M. HOLDER, GARY R. WADE, JJ., AND E. RILEY ANDERSON, SP.J., joined.

OPINION BY: CORNELIA A. CLARK

OPINION: We granted this appeal to determine whether a plaintiff who is successful in an action brought under

the Tennessee Consumer Protection Act of 1977, *Tenn. Code Ann. § § 47-18-101-125* (2001), may be awarded appellate attorney's fees. We answer that question in the affirmative. We also hold that to recover those fees a plaintiff must indicate to the appellate court that he or she is seeking to recover appellate attorney's fees. Accordingly, we affirm the judgment of the Court of Appeals.

OPINION [*2]

FACTS

The underlying facts of this case are not in dispute before this Court. The plaintiffs ("the Killingsworths") purchased a vehicle from the defendant ("Ted Russell Ford"). When the Killingsworths subsequently discovered that their "new" vehicle had sustained pre-sale damage, they brought an action against Ted Russell Ford pursuant to the Tennessee Consumer Protection Act of 1977 ("the TCPA" or "the Act"), *Tenn. Code Ann. § § 47-18-101-125* (2001). The matter went to trial, and the jury awarded the Killingsworths \$ 2,500 in compensatory damages. Following the Killingsworths' post-trial motion for attorney's fees and costs, the trial court awarded the Killingsworths a total of \$ 500. The Killingsworths appealed the fee award. The Court of Appeals concluded that the trial court had based its decision regarding fees and expenses on an erroneous "factual predicate" and remanded the case for further proceedings. See *Killingsworth v. Ted Russell Ford, Inc.*, 104 S.W.3d 530, 537 (*Tenn. Ct. App.* 2002).

On remand, the Killingsworths submitted affidavits from counsel detailing the time spent preparing the case for trial, trying the case, [*3] and handling the first appeal. The Killingsworths now sought attorney's fees totaling \$ 17,197.50 and \$ 2,448.35 in costs. The trial court awarded the Killingsworths \$ 2,000 in attorney's fees for time spent preparing and trying the case, \$ 4,500 in attorney's fees for time spent on the appeal, and \$ 2,448.35 in costs.

The Killingsworths appealed a second time on the basis that the \$ 2,000 award of attorney's fees for trial-level work was insufficient. Ted Russell Ford appealed on the basis that the attorney's fees awarded for the appellate work are not covered by the TCPA. Alternatively, Ted Russell Ford argued that, even if such fees are recoverable under the TCPA, the Killingsworths waived their right to them because they did not request them in their appellate pleadings.

On the second appeal, the Court of Appeals held that the TCPA does permit an award of attorney's fees for work on an appeal but also held that any claim for appellate attorney's fees must first be addressed to the appellate court. Because the Killingsworths did not request an

award of appellate attorney's fees at any time during the initial appeal, the Court of Appeals reversed the trial court's award of \$ 4,500. [*4] Upon its review of the trial court's award of \$ 2,000 for trial-level attorney's fees, the Court of Appeals concluded that this amount was insufficient and increased the award to \$ 6,500. n1

n1 The award of \$ 2,448.35 in discretionary costs is not at issue in this appeal.

Before this Court, the Killingsworths argue that the TCPA permits an award of attorney's fees for appellate work. They also contend that the request for such fees need not be made until after the appeal succeeds. The Killingsworths reason that a defendant is put on sufficient notice that such fees may be sought upon remand "by plaintiff's reference to the statute in the complaint." Ted Russell Ford maintains that the Court of Appeals erred in holding that appellate attorney's fees are recoverable under the TCPA; that, even if such fees are recoverable, the Killingsworths did not make a timely request for them; and that the Court of Appeals erred in increasing the award of trial-level attorney's fees.

We granted this appeal in order to determine [*5] whether reasonable attorney's fees incurred during the appeal of a case brought under the TCPA may be awarded, at what point in the litigation such fees must be requested, and whether the intermediate court erred when it increased the award of trial-level attorney's fees from \$ 2,000 to \$ 6,500. For the reasons set forth below, we now hold that the TCPA permits an award of reasonable appellate attorney's fees, that such fees must be requested in the appellate pleadings, and that the intermediate appellate court did not err in increasing the award of trial-level attorney's fees. Accordingly, we affirm the judgment of the Court of Appeals.

STANDARD OF REVIEW

This case requires us to construe certain provisions of the TCPA. [HN1] Issues of statutory construction are questions of law which this Court reviews do novo with no presumption of correctness accorded the trial court's conclusions. *Lavin v. Jordon*, 16 S.W.3d 362, 364 (Tenn. 2000). When interpreting statutes, this Court must ascertain and give effect to the legislative intent without restricting or expanding the statute's intended meaning or application. *Perrin v. Gaylord Entm't Co.*, 120 S.W.3d 823, 826 (Tenn. 2003). [*6]

ANALYSIS

I. AWARD OF APPELLATE ATTORNEY'S FEES

The TCPA provides, in pertinent part, that

[HN2] [a]ny person who suffers an ascertainable loss of money or property, real, personal, or mixed, or any other article, commodity, or thing of value wherever situated, as a result of the use or employment by another person of an unfair or deceptive act or practice declared to be unlawful by this part, may bring an action individually to recover actual damages.

Tenn. Code Ann. § 47-18-109(a)(1) (2001). [HN3] Such actions "may be brought in a court of competent jurisdiction," *id.* at (a)(2), and "the court may award three (3) times the actual damages sustained" where the court finds the defendant's conduct was a "willful or knowing violation" of the TCPA, *id.* at (a)(3). In addition to actual and punitive damages, the TCPA provides that, "[u]pon a finding by the court that a provision of [the TCPA] has been violated, the court may award to the person bringing such action *reasonable attorney's fees and costs.*" *Id.* at (e)(1) (emphasis added).

[HN4] Our General Assembly has instructed Tennessee's courts to construe the TCPA's provisions [*7] "liberally" so as "to promote," *inter alia*, the protection of "consumers and legitimate business enterprises from those who engage in unfair or deceptive acts or practices in the conduct of any trade or commerce in part or wholly within this state." *Id.* § 47-18-102(2) (2001). The Act further provides that, because it is "deemed remedial legislation necessary for the protection of the consumers of the state of Tennessee and elsewhere, [it] shall be construed to effectuate [its] purposes and intent." *Id.* § 47-18-115 (2001). This Court has previously recognized that the TCPA "is remedial, rather than regulatory in nature." *Myint v. Allstate Ins. Co.*, 970 S.W.2d 920, 925 (Tenn. 1998).

In concluding that the TCPA provides for an award of attorney's fees incurred on appeal, the Court of Appeals relied on this Court's decision in *Forbes v. Wilson County Emergency Dist.* 911 Bd., 966 S.W.2d 417 (Tenn. 1998). The Forbes case dealt with, among other things, a claim brought pursuant to the Tennessee Human Rights Act ("the THRA"), *Tenn. Code Ann. § § 4-21-101-702* (2005). The THRA prohibits discriminatory practices in [*8] several areas including employment, public accommodations, and housing and financing. See *id.* § § 4-21-401, -501, -601 (2005). The legislation was enacted to, *inter alia*, "[s]afeguard all individuals within the state from discrimination because of race, creed, color, religion, sex, age or national origin in connection with employment and public accommodations," *id.* § 4-21-

101(a)(3), protect such persons' "interest in personal dignity and freedom from humiliation," *id.* at (a)(4), and "[f]urther the interest, rights, opportunities and privileges of individuals within the state," *id.* at (a)(8). Persons filing successful claims with the Tennessee Human Rights Commission may be awarded "damages for an injury, including humiliation and embarrassment, caused by the discriminatory practice, and cost, *including a reasonable attorney's fee.*" *Tenn. Code Ann. § 4-21-306(a)(7)* (2005) (emphasis added). The THRA also preserves the rights of complainants to file a civil cause of action in chancery or circuit court, in which case the trial court is empowered to award "actual damages sustained by such plaintiff, together with the *costs of the lawsuit*, [*9] *including a reasonable fee for the plaintiff's attorney of record . . .*" *Id. § 4-21-311(b)* (2005) (emphasis added). This Court held in *Forbes*, with very little discussion, that, since the plaintiff was the prevailing party in the suit, her attorneys were "entitled to reasonable compensation for their time spent in pursuing this appeal," irrespective of her failing to prevail on all of the issues on appeal. 966 S.W.2d at 422. Our decision in *Forbes* makes clear that [HN5] legislative provisions for an award of reasonable attorney's fees need not make a specific reference to *appellate* work to support such an award where the legislation has broad remedial aims.

We agree with the Court of Appeals that [HN6] the TCPA should be construed so as to allow an award of reasonable attorney's fees generated during an appeal, and we agree with the analysis articulated by the intermediate court:

The THRA and the TCPA both contain sections setting forth the purpose and intent of the respective statutes. In very general terms, the THRA is intended to assure Tennessee has "appropriate legislation prohibiting discrimination in employment, public accommodations and housing . . ." [*10] . . . See *Tenn. Code Ann. § 4-21-101(a)(2)*. The TCPA, on the other hand, is intended "to protect consumers and legitimate business enterprises from those who engage in unfair or deceptive acts or practices in the conduct of any trade or commerce in part or wholly within this state." See *Tenn. Code Ann. § 47-18-102(2)*. The TCPA further provides that its provisions "shall be liberally construed to promote" the statute's purpose. *Tenn. Code Ann. § 47-18-102*. While the THRA and the TCPA certainly are aimed at remedying vastly different wrongs, they both are comprehensive legislation intended to protect the citizens of Tennes-

see. Both statutes also provide for a "reasonable" attorney's fee. *Tenn. Code Ann. § 4-21-306(a)(7)*; *Tenn. Code Ann. § 47-18-109(e)(1)*. Neither statute contains any language to the effect that an award of attorney fees is limited to fees incurred at the trial court level. Given that our Supreme Court has interpreted the THRA to authorize an award of attorney fees incurred on appeal, we can find no compelling reason whatsoever [*11] to interpret essentially identical language contained in the TCPA any differently. Therefore, we hold that the TCPA does authorize an award of attorney fees incurred on an appeal.

Additionally, [HN7] the TCPA allows an award of attorney's fees to a plaintiff only where the trial court has found that one of the Act's provisions "has been violated." *Tenn. Code Ann. § 47-18-109(e)(1)*. If an appeal ensues, the wronged plaintiff's monetary judgment is at risk of being consumed by the resulting appellate attorney's fees unless they are also subject to being awarded. A plaintiff successful at trial is therefore at risk of being "de-remedied" if unable to collect his or her reasonable appellate legal fees. Given the broad remedial goals our legislature determined to pursue with the TCPA, we do not think the General Assembly intended that result. As this Court has previously recognized, a potential award of attorney's fees under the TCPA is intended to make the prosecution of such claims economically viable to a plaintiff. *Miller v. United Automax*, 166 S.W.3d 692, 697 (*Tenn.* 2005) (citing *Killingsworth*, 104 S.W.3d at 535)). The [*12] same concern with economic viability applies equally to appellate attorney's fees.

We hold, therefore, that [HN8] a plaintiff may be awarded reasonable attorney's fees incurred during an appeal on a claim brought under the TCPA where one or more of the TCPA's provisions has been violated.

II. Timing of Request for Appellate Attorney's Fees

We next consider the point at which a plaintiff pursuing a claim under the TCPA must request reasonable appellate attorney's fees. We agree with the intermediate appellate court's conclusion on this issue: [HN9] "when a party is seeking attorney fees incurred on an appeal, that request, absent any statute or rule directing otherwise, must be directed first to the appellate court in a timely fashion." [HN10] Our rules of appellate procedure require an appellant to set forth in his or her brief "[a] statement of the issues presented for review." *Tenn. R. App. P. 27(a)(4)* (2006). A claim for appellate attorney's

fees is an issue that should be set before the appellate court because a remand to the trial court is not a foregone conclusion. n2 Also, as Ted Russell Ford points out in its brief to this Court, subsection (a)(8) of Rule 27 provides that an appellant's [*13] brief shall contain "[a] short conclusion, stating the precise relief sought." Tenn. R. App. P. 27(a)(8). An award of attorney's fees generated in pursuing the appeal is a form of relief; the rule requires it to be stated.

n2 As noted by the court below, one of four results may obtain following a party's request to an appellate court for an award of appellate attorney's fees: (1) the request is denied; (2) the request is granted and the appellate court sets the amount; (3) the request is granted with a remand to the trial court to set the amount; or (4) the issue is remanded to the trial court for a determination of whether the award should be made and, if so, in what amount.

The Killingsworths contend that a defendant is on notice of a plaintiff's intent to seek appellate attorney's fees by reference to the TCPA in the original complaint. While notice of a plaintiff's intent to seek fees in the trial court may be provided by such a reference, we disagree that notice of intent to seek *appellate* fees is [*14] accomplished thereby. Unless and until a judgment is rendered from which an appeal is taken, a plaintiff has no claim to appellate attorney's fees. Also, a request for appellate attorney's fees in an original complaint is nonsensical because such fees will not have been incurred by the time a judgment is rendered. Further, we agree with the intermediate appellate court that a party's failure to request appellate attorney's fees on appeal would leave that party empty-handed in the event the matter was not remanded to the trial court. Finally, a party defending an action under the TCPA is entitled to clear and timely notice that the plaintiff will be seeking attorney's fees generated during the appeal in order to address the propriety of such an award.

Relying on *Chaille v. Warren*, 689 S.W.2d 173 (Tenn. Ct. App. 1985), the Killingsworths contend that "the only proper time to request fees for legal services performed on appeal would be on the remand of the case." *Id.* at 178. We are not persuaded. In *Chaille*, the intermediate appellate court was not construing the TCPA. Rather, the court addressed the effect of *Tennessee Code Annotated* section 29-27-121 [*15] permitting an award of attorney's fees from the common fund created by the sale of partitioned land. All issues related to the partition sale, including the payment of costs and fees, are statutorily addressed to the trial court. Further,

the court was not considering the impact of Tennessee Rule of Appellate Procedure 27(a). In short, *Chaille* is not apposite to the issue now before us. We hold that [HN11] a plaintiff seeking to recover reasonable attorney's fees generated during an appeal of a case brought under the TCPA must set forth his or her intention to do so in his or her appellate pleadings. Accordingly, we hold that the Killingsworths are not entitled to their appellate attorney's fees because they failed to request them in their appellate pleadings.

III. AWARD OF TRIAL-LEVEL ATTORNEY'S FEES

In the initial appeal of this case, the Court of Appeals determined that the trial court's award of trial-level attorney's fees to the Killingsworths was inadequate. The Court of Appeals therefore remanded this issue to the trial court with instructions to take certain factors into account. Upon the Killingsworths' second appeal from the trial court's award of \$ 2,000 in trial-level [*16] attorney's fees, the Court of Appeals increased the award to \$ 6,500. Ted Russell Ford now contends that the Court of Appeals thereby erred.

We disagree. The Court of Appeals reviewed carefully the proof adduced concerning the award of fees as well as the trial court's responses thereto. The intermediate court determined that the evidence did not preponderate against the trial court's conclusion that the trial-level fees requested were excessive but also determined that the facts preponderated against the trial court's award of only \$ 2,000. Accordingly, the Court of Appeals adjusted the award of trial-level fees after "[a]pplying all the relevant factors in DR2-106 in light of the clear legislative intent of the TCPA." n3 Upon our review of the record and the relevant authority, we hold that the Court of Appeals committed no error in raising the award of trial-level fees from \$ 2,000 to \$ 6,500.

n3 At the time this case was tried in August 2001, attorney's fees were regulated by the Code of Professional Responsibility. See Tenn. S. Ct. R. 8 (2001). Disciplinary Rule 2-106, a subdivision of the Code, set forth several factors for determining appropriate fees to charge for legal services. Effective March 1, 2003, the Code was replaced by the Rules of Professional Conduct. See Tenn. S. Ct. R. 8 (2003). The provisions dealing with a lawyer's fee are currently set forth at Tennessee Supreme Court Rule 8, RPC Rule 1.5 (2006).

[*17]

CONCLUSION

We hold that [HN12] a plaintiff who establishes a violation of one or more of the provisions of the Tennessee Consumer Protection Act may be awarded reasonable attorney's fees generated during appeal(s) of the matter. In order to be awarded such fees, a plaintiff must initially request them in his or her appellate pleadings in a timely manner.

We affirm the judgment of the Court of Appeals. The costs of this cause are taxed equally to plaintiffs, James and Kathy Killingsworth, and defendant, Ted Russell Ford, Inc., for which execution may issue.

CORNELIA A. CLARK, JUSTICE

Westlaw.

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Briefs and Other Related Documents

Supreme Court of the United States
REGENTS OF the UNIVERSITY OF
CALIFORNIA, Petitioner,
v.
Allan BAKKE.
No. 76-811.

Argued Oct. 12, 1977.
Decided June 28, 1978.

White male whose application to state medical school was rejected brought action challenging legality of the school's special admissions program under which 16 of the 100 positions in the class were reserved for "disadvantaged" minority students. School cross-claimed for declaratory judgment that its program was legal. The trial court declared the program illegal but refused to order the school to admit the applicant. The California Supreme Court, 18 Cal.3d 34, 132 Cal.Rptr. 680, 553 P.2d 1152, affirmed the finding that the program was illegal and ordered the student admitted and the school sought certiorari. The Supreme Court, Mr. Justice Powell, held that: (1) the special admissions program was illegal, but (2) race may be one of a number of factors considered by school in passing on applications, and (3) since the school could not show that the white applicant would not have been admitted even in the absence of the special admissions program, the applicant was entitled to be admitted.

Affirmed in part and reversed in part.

Mr. Justice Brennan, Mr. Justice White, Mr. Justice Marshall and Mr. Justice Blackmun filed an opinion concurring in the judgment in part and dissenting.

Mr. Justice White filed a separate opinion.

Mr. Justice Marshall filed a separate opinion.

Mr. Justice Blackmun filed a separate opinion.

Mr. Justice Stevens concurred in the judgment in part and dissented in part and filed an opinion in which Mr. Chief Justice Burger, Mr. Justice Stewart and Mr. Justice Rehnquist joined.

West Headnotes

[1] Federal Courts ⇨511.1
170Bk511.1 Most Cited Cases
(Formerly 170Bk511)

Where, in action brought by white applicant to medical school for declaratory and injunctive relief against the school's denial of admission, the school had cross-claimed for declaratory judgment that its special admissions program for minority applicants was constitutional and where the lower court had determined, as a reason for its judgment in favor of the applicant, that the school's use of race in its consideration of any candidate's application was unlawful, it was proper for the Supreme Court to deal not only with the issue of the denial of admission to the white applicant but also to deal with the propriety of the use of race as a factor in reviewing applications generally.

[2] Federal Courts ⇨511.1
170Bk511.1 Most Cited Cases
(Formerly 170Bk511)

Although the petitioner for certiorari did not object to respondent's standing, where several amici had suggested that the respondent had lacked standing to bring the suit, Supreme Court was required to consider the issue of standing because it related to that court's jurisdiction under the Constitution. U.S.C.A.Const. art. 3, § 1 et seq.

[3] Stipulations ⇨3

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363k3 Most Cited Cases

Medical school's concession that white applicant who challenged his rejection on the ground that it was based on improper racial considerations had standing to challenge his rejection and to challenge the school's special admissions programs for minority students was not an improper attempt to stipulate to a conclusion of law or to disguise actual facts of record.

[4] Constitutional Law ¶42(2)

92k42(2) Most Cited Cases

The constitutional element of standing is plaintiff's demonstration of any injury to himself that is likely to be redressed by favorable decision of his claim. U.S.C.A.Const. art. 3, § 1 et seq.

[5] Civil Rights ¶1331(2)

78k1331(2) Most Cited Cases

(Formerly 78k201, 78k13.6)

Even though unsuccessful white applicant to medical school could not show that he would have been admitted to the school except for the school's special admissions program which reserved 16 of the 100 places for minority students, he had standing to maintain an action challenging the legality of the special admissions program since the program had precluded the applicant from competing for all 100 places because of his race. U.S.C.A.Const. art. 3, § 1 et seq.

[6] Civil Rights ¶1331(2)

78k1331(2) Most Cited Cases

(Formerly 78k201, 78k13.6)

Fact that white applicant to medical school was not a "disadvantaged" applicant did not preclude him from having standing to challenge the school's special admissions program which reserved 16 of the 100 places for "disadvantaged" minority students where the special admissions program was a minority enrollment program with a secondary "disadvantage" element and where white "disadvantaged" students were never considered under the special program. U.S.C.A.Const. art. 3, § 1 et seq.

[7] Civil Rights ¶1055

78k1055 Most Cited Cases

(Formerly 78k102.1, 78k102, 78k2)

Purpose of Title VI of the Civil Rights Act is the halting of federal funding of entities which violate a prohibition of racial discrimination similar to that of the Constitution. Civil Rights Act of 1964, § 601 et seq. as amended 42 U.S.C.A. § 2000d et seq.

[8] Civil Rights ¶1055

78k1055 Most Cited Cases

(Formerly 78k126, 78k111, 78k3)

Title VI of the Civil Rights Act proscribes only those racial classifications which would violate the equal protection clause of the Fourteenth Amendment or the Fifth Amendment. Civil Rights Act of 1964, § 601 et seq. as amended 42 U.S.C.A. § 2000d et seq.; U.S.C.A.Const. Amends. 5, 14.

[9] Constitutional Law ¶215

92k215 Most Cited Cases

The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color; if both are not accorded the same protection, then it is not equal. (Per Mr. Justice Powell with the Chief Justice and three Justices concurring in the judgment in part.)

[10] Civil Rights ¶1009

78k1009 Most Cited Cases

(Formerly 78k104.2, 78k104.1, 78k104, 78k3)

[10] Civil Rights ¶1033(3)

78k1033(3) Most Cited Cases

(Formerly 78k104.2, 78k104.1, 78k104, 78k3)

Racial and ethnic distinctions of any sort are inherently suspect and call for the most exacting judicial examination; such suspect classifications are subject to strict scrutiny and can be justified only if they further a compelling government purpose and, even then, only if no less restrictive alternative is available.

[11] Civil Rights ¶1009

78k1009 Most Cited Cases

(Formerly 78k104.2, 78k104.1, 78k104, 78k3)

[11] Civil Rights ¶1033(3)

78k1033(3) Most Cited Cases

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(Formerly 78k104.2, 78k104.1, 78k104, 78k3)

Preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake and is forbidden by the Constitution. (Per Mr. Justice Powell with the Chief Justice and three Justices concurring in the judgment in part.)

[12] Civil Rights ¶1033(3)

78k1033(3) Most Cited Cases

(Formerly 78k111, 78k3)

A classification which aids persons who are perceived as members of relatively victimized groups at the expense of other innocent individuals is permissible only when there are judicial, legislative, or administrative findings of constitutional or statutory violations; after such findings have been made, the governmental interest in preferring members of the injured groups at the expense of others is substantial, since the legal rights of the victims must be vindicated.

[13] Civil Rights ¶1061

78k1061 Most Cited Cases

(Formerly 78k127.1, 78k127, 78k3)

The purpose of helping certain groups whom the faculty of state medical school perceived as being victims of societal discrimination did not justify a classification, for admissions purposes, which imposed disadvantages upon white applicants who bore no responsibility for whatever harm the beneficiaries of the special admissions program were thought to have suffered. (Per Mr. Justice Powell with the Chief Justice and three Justices concurring in the judgment in part.)

[14] Colleges and Universities ¶9.15

81k9.15 Most Cited Cases

(Formerly 81k9)

The attainment of a diverse student body is a constitutionally permissible goal for an institution of higher education; however, ethnic diversity is only one element in a range of factors which a university may properly consider in attaining the goal of a heterogeneous student body; although a university must have wide discretion in making the sensitive judgments as to who should be admitted, constitutional limitations protecting individual rights may not be disregarded. (Per Mr. Justice

Powell with four Justices concurring in the judgment in part and with the Chief Justice and three Justices concurring in the judgment in part.)

[15] Colleges and Universities ¶9.15

81k9.15 Most Cited Cases

(Formerly 81k9)

A plan for achieving educational and student body diversity, such as used by Harvard College, in which race is a factor in some admission decisions and in which target quotas are not set for the number of students of any particular background and in which each applicant is treated as an individual in the admissions process is constitutional, at least so long as the use of race to achieve an integrated student body is necessitated by the lingering effects of past discrimination. U.S.C.A.Const. Amends. 1, 5, 14.

[16] Colleges and Universities ¶9.15

81k9.15 Most Cited Cases

(Formerly 81k9)

The denial to white applicant to medical school of his right to individual consideration without regard to race was the principal evil of medical school's special admissions program which reserved 16 of the 100 places in each class for "disadvantaged" members of minority groups; the fatal flaw in a preferential program was its disregard of individual rights. (Per Mr. Justice Powell with the Chief Justice and three Justices concurring in the judgment in part.) U.S.C.A.Const. Amend. 14.

[17] Colleges and Universities ¶9.15

81k9.15 Most Cited Cases

(Formerly 81k9)

The state has a substantial interest which may legitimately be served by a properly devised admissions program for its medical school which involves the competitive consideration of race and ethnic origin; medical school need not forego all considerations of race of applicants in determining which applicants will be admitted to the school.

[18] Civil Rights ¶1448

78k1448 Most Cited Cases

(Formerly 78k261, 78k13.16)

Since medical school could not show that, were it

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not for the existence of its unlawful special admissions program which reserved 16 of the 100 places in the class for "disadvantaged" minority students, white applicant still would not have been admitted, white applicant who successfully challenged the legality of the special admissions program was entitled to relief admitting him to the school. (Per Mr. Justice Powell with the Chief Justice and three Justices concurring in the judgment in part.)

[19] Federal Courts ¶513

170Bk513 Most Cited Cases

Where medical school had rejected white male's application in part because it had reserved 16 of the 100 places in the class for "disadvantaged" minority group members, and where the special admissions program was found to be illegal, school was not entitled to attempt to reconstruct what might have happened with respect to the white male's application had the school been operating a legitimate admissions program so that there was no need for the Supreme Court to remand the case for that purpose rather than affirming an order directing that the white male be admitted. (Per Mr. Justice Powell with the Chief Justice and three Justices concurring in the judgment in part.)

****2735 *265 Syllabus [FN*]**

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

The Medical School of the University of California at Davis (hereinafter Davis) had two admissions programs for the entering ****2736** class of 100 students--the regular admissions program and the special admissions program. Under the regular procedure, candidates whose overall undergraduate grade point averages fell below 2.5 on a scale of 4.0 were summarily rejected. About one out of six applicants was then given an interview, following which he was rated on a scale of 1 to 100 by each of the committee members (five in 1973 and six in 1974), his rating being based on

the interviewers' summaries, his overall grade point average, his science courses grade point average, his Medical College Admissions Test (MCAT) scores, letters of recommendation, extracurricular activities, and other biographical data, all of which resulted in a total "benchmark score." The full admissions committee then made offers of admission on the basis of their review of the applicant's file and his score, considering and acting upon applications as they were received. The committee chairman was responsible for placing names on the waiting list and had discretion to include persons with "special skills." A separate committee, a majority of whom were members of minority groups, operated the special admissions program. The 1973 and 1974 application forms, respectively, asked candidates whether they wished to be considered as "economically and/or educationally disadvantaged" applicants and members of a "minority group" (blacks, Chicanos, Asians, American Indians). If an applicant of a minority group was found to be "disadvantaged," he would be rated in a manner similar to the one employed by the general admissions committee. Special candidates, however, did not have to meet the 2.5 grade point cutoff and were not ranked against candidates in the general admissions process. About one-fifth of the special applicants were invited for interviews in 1973 and 1974, following which they were given benchmark scores, and the top choices were then given to the general admissions committee, which could reject special candidates for failure to meet course requirements or other specific deficiencies. The special committee continued to recommend candidates until 16 special admission selections had been made. During a four-year period 63 minority ***266** students were admitted to Davis under the special program and 44 under the general program. No disadvantaged whites were admitted under the special program, though many applied. Respondent, a white male, applied to Davis in 1973 and 1974, in both years being considered only under the general admissions program. Though he had a 468 out of 500 score in 1973, he was rejected since no general applicants with scores less than 470 were being accepted after respondent's application, which was filed late in the year, had

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been processed and completed. At that time four special admission slots were still unfilled. In 1974 respondent applied early, and though he had a total score of 549 out of 600, he was again rejected. In neither year was his name placed on the discretionary waiting list. In both years special applicants were admitted with significantly lower scores than respondent's. After his second rejection, respondent filed this action in state court for mandatory, injunctive, and declaratory relief to compel his admission to Davis, alleging that the special admissions program operated to exclude him on the basis of his race in violation of the Equal Protection Clause of the Fourteenth Amendment, a provision of the California Constitution, and § 601 of Title VI of the Civil Rights Act of 1964, which provides, *inter alia*, that no person shall on the ground of race or color be excluded from participating in any program receiving federal financial assistance. Petitioner cross-claimed for a declaration that its special admissions program was lawful. The trial court found that the special program operated as a racial quota, because minority applicants in that program were rated only against one another, and 16 places in the class of 100 were reserved for them. Declaring that petitioner could not take race into account in making admissions decisions, the program was held to violate the Federal and State Constitutions and Title VI. Respondent's admission was not ordered, however, for lack of proof that he would have **2737 been admitted but for the special program. The California Supreme Court, applying a strict-scrutiny standard, concluded that the special admissions program was not the least intrusive means of achieving the goals of the admittedly compelling state interests of integrating the medical profession and increasing the number of doctors willing to serve minority patients. Without passing on the state constitutional or federal statutory grounds the court held that petitioner's special admissions program violated the Equal Protection Clause. Since petitioner could not satisfy its burden of demonstrating that respondent, absent the special program, would not have been admitted, the court ordered his admission to Davis.

Held: The judgment below is affirmed insofar as

it orders respondent's admission to Davis and invalidates petitioner's special admissions program, *267 but is reversed insofar as it prohibits petitioner from taking race into account as a factor in its future admissions decisions.

18 Cal.3d 34, 132 Cal.Rptr. 680, 553 P.2d 1152, affirmed in part and reversed in part.

Mr. Justice POWELL concluded:

1. Title VI proscribes only those racial classifications that would violate the Equal Protection Clause if employed by a State or its agencies. Pp. 2744- 2747.

2. Racial and ethnic classifications of any sort are inherently suspect and call for the most exacting judicial scrutiny. While the goal of achieving a diverse student body is sufficiently compelling to justify consideration of race in admissions decisions under some circumstances, petitioner's special admissions program, which forecloses consideration to persons like respondent, is unnecessary to the achievement of this compelling goal and therefore invalid under the Equal Protection Clause. Pp. 2747-2764.

3. Since petitioner could not satisfy its burden of proving that respondent would not have been admitted even if there had been no special admissions program, he must be admitted. P. 2764.

Mr. Justice BRENNAN, Mr. Justice WHITE, Mr. Justice MARSHALL, and Mr. Justice BLACKMUN concluded:

1. Title VI proscribes only those racial classifications that would violate the Equal Protection Clause if employed by a State or its agencies. Pp. 2768- 2781.

2. Racial classifications call for strict judicial scrutiny. Nonetheless, the purpose of overcoming substantial, chronic minority underrepresentation in the medical profession is sufficiently important to justify petitioner's remedial use of race. Thus, the judgment below must be reversed in that it prohibits

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race from being used as a factor in university admissions. Pp. 2782-2794.

Mr. Justice STEVENS, joined by THE CHIEF JUSTICE, Mr. Justice STEWART, and Mr. Justice REHNQUIST, being of the view that whether race can ever be a factor in an admissions policy is not an issue here; that Title VI applies; and that respondent was excluded from Davis in violation of Title VI, concurs in the Court's judgment insofar as it affirms the judgment of the court below ordering respondent admitted to Davis. Pp. 2809-2815.

***268** Archibald Cox, Cambridge, Mass., for petitioner.

Sol. Gen. Wade H. McCree, Jr., Washington, D. C., for United States, as amicus curiae, by special leave of Court.

Reynold H. Colvin, San Francisco, Cal., for respondent.

***269** Mr. Justice POWELL announced the judgment of the Court.

[1] This case presents a challenge to the special admissions program of the petitioner, the Medical School of the University of California at Davis, which is designed to assure the admission ***270** of a specified number of students from certain minority groups. The Superior Court of California sustained respondent's challenge, holding that petitioner's program violated the California Constitution, Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.*, and the Equal Protection Clause of the Fourteenth ****2738** Amendment. The court enjoined petitioner from considering respondent's race or the race of any other applicant in making admissions decisions. It refused, however, to order respondent's admission to the Medical School, holding that he had not carried his burden of proving that he would have been admitted but for the constitutional and statutory violations. The Supreme Court of California affirmed those portions of the trial court's judgment declaring the special admissions program unlawful and enjoining petitioner from considering the race of any

applicant. [FN**]***271** It modified that portion of the judgment denying respondent's requested injunction and directed the trial court to order his admission.

FN** Mr. Justice STEVENS views the judgment of the California court as limited to prohibiting the consideration of race only in passing upon Bakke's application. *Post*, at 2809-2810. It must be remembered, however, that petitioner here cross-complained in the trial court for a declaratory judgment that its special program was constitutional and it lost. The trial court's judgment that the special program was unlawful was affirmed by the California Supreme Court in an opinion which left no doubt that the reason for its holding was petitioner's use of race in consideration of *any candidate's* application. Moreover, in explaining the scope of its holding, the court quite clearly stated that petitioner was prohibited from taking race into account in any way in making admissions decisions: "In addition, the University may properly as it in fact does, consider other factors in evaluating an applicant, such as the personal interview, recommendations, character, and matters relating to the needs of the profession and society, such as an applicant's professional goals. In short, the standards for admission employed by the University are not constitutionally infirm except to the extent that they are utilized in a racially discriminatory manner. Disadvantaged applicants of all races must be eligible for sympathetic consideration, and no applicant may be rejected because of his race, in favor of another who is less qualified, as measured by standards applied without regard to race. We reiterate, in view of the dissent's misinterpretation, that we do not compel the University to utilize only 'the highest objective academic credentials' as the criterion for admission." 18 Cal.3d 34, 54-55, 132 Cal.Rptr. 680, 693-694, 553

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P.2d 1152, 1166 (1976) (footnote omitted).

This explicit statement makes it unreasonable to assume that the reach of the California court's judgment can be limited in the manner suggested by Mr. Justice STEVENS.

For the reasons stated in the following opinion, I believe that so much of the judgment of the California court as holds petitioner's special admissions program unlawful and directs that respondent be admitted to the Medical School must be affirmed. For the reasons expressed in a separate opinion, my Brothers THE CHIEF JUSTICE, Mr. Justice STEWART, Mr. Justice REHNQUIST and Mr. Justice STEVENS concur in this judgment.

***272** I also conclude for the reasons stated in the following opinion that the portion of the court's judgment enjoining petitioner from according any consideration to race in its admissions process must be reversed. For reasons expressed in separate opinions, my Brothers Mr. Justice BRENNAN, Mr. Justice WHITE, Mr. Justice MARSHALL, and Mr. Justice BLACKMUN concur in this judgment.

Affirmed in part and reversed in part.

I [FN*]

FN* Mr. Justice BRENNAN, Mr. Justice WHITE, Mr. Justice MARSHALL, and Mr. Justice BLACKMUN join Parts I and V-C of this opinion. Mr. Justice WHITE also joins Part III-A of this opinion.

The Medical School of the University of California at Davis opened in 1968 with an entering class of 50 students. In 1971, the size of the entering class was increased to 100 students, a level at which it remains. No admissions program for disadvantaged or minority students existed when the school opened, and the first class contained three Asians but no blacks, no Mexican-Americans, and no American Indians. Over the next two years, the faculty devised a special admissions program to

increase the representation of "disadvantaged" students in each Medical School class. [FN1] The special ****2739** program consisted of ***273** a separate admissions system operating in coordination with the regular admissions process.

FN1. Material distributed to applicants for the class entering in 1973 described the special admissions program as follows:

"A special subcommittee of the Admissions Committee, made up of faculty and medical students from minority groups, evaluates applications from economically and/or educationally disadvantaged backgrounds. The applicant may designate on the application form that he or she requests such an evaluation. Ethnic minorities are not categorically considered under the Task Force Program unless they are from disadvantaged backgrounds. Our goals are: 1) A short range goal in the identification and recruitment of potential candidates for admission to medical school in the near future, and 2) Our long-range goal is to stimulate career interest in health professions among junior high and high school students.

"After receiving all pertinent information selected applicants will receive a letter inviting them to our School of Medicine in Davis for an interview. The interviews are conducted by at least one faculty member and one student member of the Task Force Committee. Recommendations are then made to the Admissions Committee of the medical school. Some of the Task Force Faculty are also members of the Admissions Committee.

"Long-range goals will be approached by meeting with counselors and students of schools with large minority populations, as well as with local youth and adult community groups.

"Applications for financial aid are available only *after* the applicant has been accepted and can only be awarded after

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registration. Financial aid is available to students in the form of scholarships and loans. In addition to the Regents' Scholarships and President's Scholarship programs, the medical school participates in the Health Professions Scholarship Program, which makes funds available to students who otherwise might not be able to pursue a medical education. Other scholarships and awards are available to students who meet special eligibility qualifications. Medical students are also eligible to participate in the Federally Insured Student Loan Program and the American Medical Association Education and Research Foundation Loan Program.

"Applications for Admissions are available from:

"Admissions Office

School of Medicine

University of California

Davis, California 95616" Record 195.

The letter distributed the following year was virtually identical, except that the third paragraph was omitted.

Under the regular admissions procedure, a candidate could submit his application to the Medical School beginning in July of the year preceding the academic year for which admission was sought. Record 149. Because of the large number of applications, [FN2] the admissions committee screened each one to select candidates for further consideration. Candidates whose overall undergraduate grade point averages fell below 2.5 on a scale of 4.0 were summarily rejected. *Id.*, at 63. About *274 one out of six applicants was invited for a personal interview. *Ibid.* Following the interviews, each candidate was rated on a scale of 1 to 100 by his interviewers and four other members of the admissions committee. The rating embraced the interviewers' summaries, the candidate's overall grade point average, grade point average in science courses, scores on the Medical College Admissions Test (MCAT), letters of recommendation, extracurricular activities, and other biographical data. *Id.*, at 62. The ratings were added together to arrive at each candidate's

"benchmark" score. Since five committee members rated each candidate in 1973, a perfect score was 500; in 1974, six members rated each candidate, so that a perfect score was 600. The full committee then reviewed the file and scores of each applicant and made offers of admission on a "rolling" basis. [FN3] The chairman was responsible for placing names on the waiting list. They were not placed in strict numerical order; instead, the chairman had discretion to include persons with "special skills." *Id.*, at 63-64.

FN2. For the 1973 entering class of 100 seats, the Davis Medical School received 2,464 applications. *Id.*, at 117. For the 1974 entering class, 3,737 applications were submitted. *Id.*, at 289.

FN3. That is, applications were considered and acted upon as they were received, so that the process of filling the class took place over a period of months, with later applications being considered against those still on file from earlier in the year. *Id.*, at 64.

The special admissions program operated with a separate committee, a majority of whom were members of minority groups. *Id.*, at 163. On the 1973 application form, **2740 candidates were asked to indicate whether they wished to be considered as "economically and/or educationally disadvantaged" applicants; on the 1974 form the question was whether they wished to be considered as members of a "minority group," which the Medical School apparently viewed as "Blacks," "Chicanos," "Asians," and "American Indians." *Id.*, at 65-66, 146, 197, 203-205, 216-218. If these questions were answered affirmatively, the application was forwarded to the special admissions committee. No formal definition of "disadvantaged" *275 was ever produced, *id.*, at 163-164, but the chairman of the special committee screened each application to see whether it reflected economic or educational deprivation. [FN4]

Having passed this initial hurdle, the applications then were rated by the special committee in a fashion similar to that used by the general

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admissions committee, except that special candidates did not have to meet the 2.5 grade point average cutoff applied to regular applicants. About one-fifth of the total number of special applicants were invited for interviews in 1973 and 1974. [FN5]

Following each interview, the special committee assigned each special applicant a benchmark score. The special committee then presented its top choices to the general admissions committee. The latter did not rate or compare the special candidates against the general applicants, *id.*, at 388, but could reject recommended special candidates for failure to meet course requirements or other specific deficiencies. *Id.*, at 171-172. The special committee continued to recommend special applicants until a number prescribed by faculty vote were admitted. While the overall class size was still 50, the prescribed number was 8; in 1973 and 1974, when the class size had doubled to 100, the prescribed number of special admissions also doubled, to 16. *Id.*, at 164, 166.

FN4. The chairman normally checked to see if, among other things, the applicant had been granted a waiver of the school's application fee, which required a means test; whether the applicant had worked during college or interrupted his education to support himself or his family; and whether the applicant was a member of a minority group. *Id.*, at 65-66.

FN5. For the class entering in 1973, the total number of special applicants was 297, of whom 73 were white. In 1974, 628 persons applied to the special committee, of whom 172 were white. *Id.*, at 133-134.

From the year of the increase in class size--1971--through 1974, the special program resulted in the admission of 21 black students, 30 Mexican-Americans, and 12 Asians, for a total of 63 minority students. Over the same period, the regular admissions program produced 1 black, 6 Mexican-Americans, *276 and 37 Asians, for a total of 44 minority students. [FN6] Although disadvantaged whites applied to the special program in large numbers, see n. 5, *supra*, none received an

offer of admission through that process. Indeed, in 1974, at least, the special committee explicitly considered only "disadvantaged" special applicants who were members of one of the designated minority groups. Record 171.

FN6. The following table provides a year-by-year comparison of minority admissions at the Davis Medical School:

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	Special Admissions Program				General Admissions				Total
	Blacks	Chicanos	Asians	Total	Blacks	Chicanos	Asians	Total	
1970....	5	3	0	8	0	0	4	4	12
1971....	4	9	2	15	1	0	8	9	24
1972....	5	6	5	16	0	0	11	11	27
1973....	6	8	2	16	0	2	13	15	31
1974....	6	7	3	16	0	4	5	9	25

Id., at 216-218. Sixteen persons were admitted under the special program in 1974, *ibid.*, but one Asian withdrew before the start of classes, and the vacancy was filled by a candidate from the general admissions waiting list. Brief for Petitioner 4 n. 5.

****2741** Allan Bakke is a white male who applied to the Davis Medical School in both 1973 and 1974. In both years Bakke's application was considered under the general admissions program, and he received an interview. His 1973 interview was with Dr. Theodore C. West, who considered Bakke "a very desirable applicant to [the] medical school." *Id.*, at 225. Despite a strong benchmark score of 468 out of 500, Bakke was rejected. His application had come late in the year, and no applicants in the general admissions process with scores below 470 were accepted after Bakke's application was completed. *Id.*, at 69. There were four special admissions slots unfilled at that time however, for which Bakke was not considered. *Id.*, at 70. After his 1973 rejection, Bakke wrote to Dr. George H. Lowrey, Associate Dean and Chairman of the Admissions Committee, protesting that the special admissions program operated as a racial and ethnic quota. *id.*, AT 259.

***277** Bakke's 1974 application was completed early in the year. *Id.*, at 70. His student interviewer gave him an overall rating of 94, finding him "friendly, well tempered, conscientious and delightful to speak with." *Id.*, at 229. His faculty interviewer was, by coincidence, the same Dr. Lowrey to whom he had written in protest of the special admissions program. Dr. Lowrey found

Bakke "rather limited in his approach" to the problems of the medical profession and found disturbing Bakke's "very definite opinions which were based more on his personal viewpoints than upon a study of the total problem." *Id.*, at 226. Dr. Lowrey gave Bakke the lowest of his six ratings, an 86; his total was 549 out of 600. *Id.*, at 230. Again, Bakke's application was rejected. In neither year did the chairman of the admissions committee, Dr. Lowrey, exercise his discretion to place Bakke on the waiting list. *Id.*, at 64. In both years, applicants were admitted under the special program with grade point averages, MCAT scores, and benchmark scores significantly lower than Bakke's. [FN7]

FN7. The following table compares Bakke's science grade point average, overall grade point average, and MCAT scores with the average scores of regular admittees and of special admittees in both 1973 and 1974. Record 210, 223, 231, 234:

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Class Entering in 1973						
MCAT (percentiles)						
	SGPA	OGPA	Verbal	Quantitative	Science	Gen. Infor.
Bakke	3.44	3.46	96	94	97	72
Average of regular admittees	3.51	3.49	81	76	83	69
Average of special admittees	2.62	2.88	46	24	35	33

Class Entering in 1974						
MCAT (Percentiles)						
	SGPA	OGPA	Verbal	Quantitative	Science	Gen. Infor.
Bakke	3.44	3.46	96	94	97	72
Average of regular admittees	3.36	3.29	69	67	82	72
Average of special admittees	2.42	2.62	34	30	37	18

Applicants admitted under the special program also had benchmark scores significantly lower than many students, including Bakke, rejected under the general admissions program, even though the special rating system apparently gave credit for overcoming "disadvantage." *Id.*, at 181, 388.

After the second rejection, Bakke filed the instant suit in the Superior Court of California. [FN8] He sought mandatory, injunctive, ****2742** and declaratory relief compelling his admission to the Medical School. He alleged that the Medical School's special admissions program operated to exclude him from the ***278** school on the basis of his race, in violation of his rights under the Equal Protection Clause of the Fourteenth Amendment, [FN9] Art. I, § 21, of the California Constitution, [FN10] and § 601 of Title VI of the Civil Rights Act of 1964, 78 Stat. 252, 42 U.S.C. § 2000d. [FN11] The University cross-complained for a declaration that its special admissions program was

lawful. The trial ***279** court found that the special program operated as a racial quota, because minority applicants in the special program were rated only against one another. Record 388 and 16 places in the class of 100 were reserved for them. *Id.*, at 295-296. Declaring that the University could not take race into account in making admissions decisions, the trial court held the challenged program violative of the Federal Constitution, the State Constitution, and Title VI. The court refused to order Bakke's admission, however, holding that he had failed to carry his burden of proving that he would have been admitted but for the existence of the special program.

FN8. Prior to the actual filing of the suit, Bakke discussed his intentions with Peter C. Storandt, Assistant to the Dean of Admissions at the Davis Medical School. *Id.*, at 259-269. Storandt expressed sympathy for Bakke's position and offered advice on litigation strategy. Several *amici* imply that these discussions render Bakke's

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suit "collusive." There is no indication, however, that Storandt's views were those of the Medical School or that anyone else at the school even was aware of Storandt's correspondence and conversations with Bakke. Storandt is no longer with the University.

FN9. "[N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws."

FN10. "No special privileges or immunities shall ever be granted which may not be altered, revoked, or repealed by the Legislature; nor shall any citizen, or class of citizens, be granted privileges or immunities which, upon the same terms, shall not be granted to all citizens."

This section was recently repealed and its provisions added to Art. I, § 7, of the State Constitution.

FN11. Section 601 of Title VI, 78 Stat. 252, provides as follows:

"No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

Bakke appealed from the portion of the trial court judgment denying him admission, and the University appealed from the decision that its special admissions program was unlawful and the order enjoining it from considering race in the processing of applications. The Supreme Court of California transferred the case directly from the trial court, "because of the importance of the issues involved." 18 Cal.3d 34, 39, 132 Cal.Rptr. 680, 684, 553 P.2d 1152, 1156 (1976). The California court accepted the findings of the trial court with respect to the University's program. [FN12] Because the special admissions program involved a racial classification, the Supreme Court held itself bound to apply strict scrutiny. *Id.*, at 49, 132

Cal.Rptr., at 690, 553 P.2d, at 1162-1163. It then turned to the goals the University presented as justifying the special program. Although the court agreed that the goals of integrating the medical profession and increasing the number of physicians willing to serve members of minority groups were compelling state interests, *id.*, at 53, 132 Cal.Rptr., at 693, 553 P.2d, at 1165, it concluded that the special admissions program was not the least intrusive means of achieving those goals. Without passing on the state constitutional or the federal statutory grounds cited in the trial court's judgment, the California court held *280 that the Equal Protection Clause of the Fourteenth Amendment required that "no applicant may be rejected because of his race, in favor of another who is less qualified, as measured by standards applied without regard to race." *Id.*, at 55, 132 Cal.Rptr., at 694, 553 P.2d, at 1166.

FN12. Indeed, the University did not challenge the finding that applicants who were not members of a minority group were excluded from consideration in the special admissions process. 18 Cal.3d, at 44, 132 Cal.Rptr., at 687, 553 P.2d, at 1159

**2743 [2][3][4][5][6] Turning to Bakke's appeal, the court ruled that since Bakke had established that the University had discriminated against him on the basis of his race, the burden of proof shifted to the University to demonstrate that he would not have been admitted even in the absence of the special admissions program. [FN13] *Id.*, at 63-64, 132 Cal.Rptr., at 699-700, 553 P.2d, at 1172. The court analogized Bakke's situation to that of a plaintiff under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-17 (1970 ed., Supp. V), see, e. g., *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 772, 96 S.Ct. 1251, 1267, 47 L.Ed.2d 444 (1976). 18 Cal.3d, at 63-64, 132 Cal.Rptr., at 700, 553 P.2d, at 1172. On this basis, the court initially ordered a remand for the purpose of determining whether, under the newly allocated burden of proof, Bakke would have been admitted to either the 1973 or the 1974 entering class in the absence of the special admissions program. App.

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A to Application for Stay 48. In its petition for rehearing below, however, the University conceded its inability to carry that burden. App. B to Application for Stay A19-A20. [FN14] The *281 California court thereupon amended its opinion to direct that the trial court enter judgment ordering Bakke's admission to the Medical School. 18 Cal.3d, at 64, 132 Cal.Rptr., at 700, 553 P.2d, at 1172. That order was stayed pending review in this Court. 429 U.S. 953, 97 S.Ct. 573, 50 L.Ed.2d 321 (1976). We granted certiorari to consider the important constitutional issue. 429 U.S. 1090, 97 S.Ct. 1098, 51 L.Ed.2d 535 (1977).

FN13. Petitioner has not challenged this aspect of the decision. The issue of the proper placement of the burden of proof, then, is not before us.

FN14. Several *amici* suggest that Bakke lacks standing, arguing that he never showed that his injury--exclusion from the Medical School--will be redressed by a favorable decision, and that the petitioner "fabricated" jurisdiction by conceding its inability to meet its burden of proof. Petitioner does not object to Bakke's standing, but inasmuch as this charge concerns our jurisdiction under Art. III, it must be considered and rejected. First, there appears to be no reason to question the petitioner's concession. It was not an attempt to stipulate to a conclusion of law or to disguise actual facts of record. Cf. *Swift & Co. v. Hocking Valley R. Co.*, 243 U.S. 281, 37 S.Ct. 287, 61 L.Ed. 722 (1917).

Second, even if Bakke had been unable to prove that he would have been admitted in the absence of the special program, it would not follow that he lacked standing. The constitutional element of standing is plaintiff's demonstration of any injury to himself that is likely to be redressed by favorable decision of his claim. *Warth v. Seldin*, 422 U.S. 490, 498, 95 S.Ct. 2197, 2204, 45 L.Ed.2d 243 (1975). The trial court found such an injury, apart from

failure to be admitted, in the University's decision not to permit Bakke to compete for all 100 places in the class, simply because of his race. Record 323. Hence the constitutional requirements of Art. III were met. The question of Bakke's admission *vel non* is merely one of relief. Nor is it fatal to Bakke's standing that he was not a "disadvantaged" applicant. Despite the program's purported emphasis on disadvantage, it was a minority enrollment program with a secondary disadvantage element. White disadvantaged students were never considered under the special program, and the University acknowledges that its goal in devising the program was to increase minority enrollment.

II

In this Court the parties neither briefed nor argued the applicability of Title VI of the Civil Rights Act of 1964. Rather, as had the California court, they focused exclusively upon the validity of the special admissions program under the Equal Protection Clause. Because it was possible, however, that a decision on Title VI might obviate resort to constitutional interpretation, see *Ashwander v. TVA*, 297 U.S. 288, 346-348, 56 S.Ct. 466, 80 L.Ed. 688 (1936) (concurring opinion), we requested supplementary briefing on the statutory issue. 434 U.S. 900, 98 S.Ct. 293, 54 L.Ed.2d 186 (1977).

A

At the outset we face the question whether a right of action for private parties exists under Title VI. Respondent argues that there is a private right of action, invoking **2744 the test set forth in *Cort v. Ash*, 422 U.S. 66, 78, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975). He contends *282 that the statute creates a federal right in his favor, that legislative history reveals an intent to permit private actions, [FN15] that such actions would further the remedial purposes of the statute, and that enforcement of federal rights under the Civil Rights Act generally is not relegated to the States. In addition, he cites several lower court decisions which have recognized or assumed the existence of a private

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right of action. [FN16] Petitioner denies the existence of a private right of action, arguing that the sole function of § 601, see n. 11, *supra*, was to establish a predicate for administrative action under § 602, 78 Stat. 252, 42 U.S.C. § 2000d-1. [FN17] In its view, administrative curtailment of federal funds under that section was the only sanction to be imposed upon recipients that *283 violated § 601. Petitioner also points out that Title VI contains no explicit grant of a private right of action, in contrast to Titles II, III, IV, and VII, of the same statute, 42 U.S.C. §§ 2000a-3(a), 2000b-2, 2000c-8, and 2000e-5(f) (1970 ed. and Supp. V). [FN18]

FN15. See, e. g., 110 Cong.Rec. 5255 (1964) (remarks of Sen. Case).

FN16. E. g., *Bossier Parish School Board v. Lemon*, 370 F.2d 847, 851-852 (CA5), cert. denied, 388 U.S. 911, 87 S.Ct. 2116, 18 L.Ed.2d 1350 (1967); *Natonabah v. Board of Education*, 355 F.Supp. 716, 724 (NM 1973); cf. *Lloyd v. Regional Transportation Authority*, 548 F.2d 1277, 1284-1287 (C.A.7 1977) (Title V of Rehabilitation Act of 1973, 29 U.S.C. § 790 *et seq.* (1976 ed.)); *Piascik v. Cleveland Museum of Art*, 426 F.Supp. 779, 780 n. 1 (N.D. Ohio 1976) (Title IX of Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.* (1976 ed.)).

FN17. Section 602, as set forth in 42 U.S.C. § 2000d-1, reads as follows:
"Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 2000d of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule,

regulation, or order shall become effective unless and until approved by the President. Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made and, shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found, or (2) by any other means authorized by law: *Provided, however,* That no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means. In the case of any action terminating, or refusing to grant or continue, assistance because of failure to comply with a requirement imposed pursuant to this section, the head of the Federal department or agency shall file with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action. No such action shall become effective until thirty days have elapsed after the filing of such report."

FN18. Several comments in the debates cast doubt on the existence of any intent to create a private right of action. For example, Representative Gill stated that no private right of action was contemplated:
"Nowhere in this section do you find a comparable right of legal action for a person who feels he has been denied his rights to participate in the benefits of Federal funds. Nowhere. Only those who

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have been cut off can go to court and present their claim." 110 Cong.Rec. 2467 (1964). Accord, *id.*, at 7065 (remarks of Sen. Keating); 6562 (remarks of Sen. Kuchel).

We find it unnecessary to resolve this question in the instant case. The question of respondent's right to bring an action under Title VI was neither argued nor decided in either of the courts below, and this Court has been hesitant to review questions not addressed below. *McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 434-435, 60 S.Ct. 670, 672-673, 84 L.Ed. 849 (1940). See also *Massachusetts v. Westcott*, 431 U.S. 322, 97 S.Ct. 1755, 52 L.Ed.2d 349 (1977); *Cardinale v. Louisiana*, 394 U.S. 437, 439, 89 S.Ct. 1161, 1163, 22 L.Ed.2d 398 (1969). Cf. *Singleton v. Wulff*, 428 U.S. 106, 121, 96 S.Ct. 2868, 2877, 49 L.Ed.2d 826 (1976). We therefore do not address this difficult issue. Similarly, we need not pass *284 upon petitioner's claim that private plaintiffs under Title VI must exhaust administrative remedies. We assume, only for the purposes of this case, that respondent has a right of action under Title VI. See *Lau v. Nichols*, 414 U.S. 563, 571 n. 2, 94 S.Ct. 786, 790, 39 L.Ed.2d 1 (1974) (STEWART, J., concurring in result).

B

[7] The language of § 601, 78 Stat. 252, like that of the Equal Protection Clause, is majestic in its sweep:

"No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

The concept of "discrimination," like the phrase "equal protection of the laws," is susceptible of varying interpretations, for as Mr. Justice Holmes declared, "[a] word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used." *Towne v. Eisner*, 245 U.S. 418, 425, 38 S.Ct. 158, 159, 62 L.Ed. 372 (1918). We must, therefore,

seek whatever aid is available in determining the precise meaning of the statute before us. *Train v. Colorado Public Interest Research Group*, 426 U.S. 1, 10, 96 S.Ct. 1938, 1942, 48 L.Ed.2d 434 (1976), quoting *United States v. American Trucking Assns.*, 310 U.S. 534, 543-544, 60 S.Ct. 1059, 1063-1064, 84 L.Ed. 1345 (1940). Examination of the voluminous legislative history of Title VI reveals a congressional intent to halt federal funding of entities that violate a prohibition of racial discrimination similar to that of the Constitution. Although isolated statements of various legislators taken out of context, can be marshaled in support of the proposition that § 601 enacted a purely color-blind scheme, [FN19] without regard to the reach of the Equal Protection *285 Clause, these comments must be read against the background of both the problem that Congress was addressing and the broader view of the statute that emerges from a full examination of the legislative debates.

FN19. For example, Senator Humphrey stated as follows:

"Racial discrimination or segregation in the administration of disaster relief is particularly shocking; and offensive to our sense of justice and fair play. Human suffering draws no color lines, and the administration of help to the sufferers should not." *Id.*, at 6547.

See also *id.*, at 12675 (remarks of Sen. Allott); 6561 (remarks of Sen. Kuchel); 2494, 6047 (remarks of Sen. Pastore). But see *id.*, at 15893 (remarks of Rep. MacGregor); 13821 (remarks of Sen. Saltonstall); 10920 (remarks of Sen. Javits); 5266, 5807 (remarks of Sen. Keating).

The problem confronting Congress was discrimination against Negro citizens at the hands of recipients of federal moneys. Indeed, the color blindness pronouncements cited in the margin at n. 19, generally occur in the midst of extended remarks dealing with the evils of segregation in federally funded programs. Over and over again, proponents of the bill detailed the plight of Negroes seeking equal treatment in such programs. [FN20]

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There simply was no reason for Congress to consider the validity of hypothetical preferences that might be accorded minority citizens; the legislators were dealing with the real and pressing problem of how to guarantee those citizens equal treatment.

FN20. See, e. g., *id.*, at 7064-7065 (remarks of Sen. Ribicoff); 7054-7055 (remarks of Sen. Pastore); 6543-6544 (remarks of Sen. Humphrey); 2595 (remarks of Rep. Donohue); 2467-2468 (remarks of Rep. Celler); 1643, 2481-2482 (remarks of Rep. Ryan); H.Rep.No.914, 88th Cong., 1st Sess., pt. 2, pp. 24-25 (1963), U.S.Code Cong. & Admin.News 1964, p. 2355.

In addressing that problem, supporters of Title VI repeatedly declared that the bill enacted constitutional principles. For example, ***2746** Representative Celler, the Chairman of the House Judiciary Committee and floor manager of the legislation in the House, emphasized this in introducing the bill:

"The bill would offer assurance that hospitals financed by Federal money would not deny adequate care to Negroes. It would prevent abuse of food distribution programs whereby Negroes have been known to be denied food ***286** surplus supplies when white persons were given such food. It would assure Negroes the benefits now accorded only white students in programs of high[er] education financed by Federal funds. It would, in short, *assure the existing right to equal treatment* in the enjoyment of Federal funds. It would not destroy any rights of private property or freedom of association." 110 Cong.Rec. 1519 (1964) (emphasis added).

Other sponsors shared Representative Celler's view that Title VI embodied constitutional principles. [FN21]

FN21. See, e. g., 110 Cong.Rec. 2467 (1964) (remarks of Rep. Lindsay). See also *id.*, at 2766 (remarks of Rep. Matsunaga); 2731- 2732 (remarks of Rep.

Dawson); 2595 (remarks of Rep. Donohue); 1527-1528 (remarks of Rep. Celler).

In the Senate, Senator Humphrey declared that the purpose of Title VI was "to insure that Federal funds are spent in accordance with the Constitution and the moral sense of the Nation." *Id.*, at 6544. Senator Ribicoff agreed that Title VI embraced the constitutional standard: "Basically, there is a constitutional restriction against discrimination in the use of federal funds; and title VI simply spells out the procedure to be used in enforcing that restriction." *Id.*, at 13333. Other Senators expressed similar views. [FN22]

FN22. See, e. g., *id.*, at 12675, 12677 (remarks of Sen. Allott); 7064 (remarks of Sen. Pell); 7057, 7062-7064 (remarks of Sen. Pastore); 5243 (remarks of Sen. Clark).

Further evidence of the incorporation of a constitutional standard into Title VI appears in the repeated refusals of the legislation's supporters precisely to define the term "discrimination." Opponents sharply criticized this failure, [FN23] but proponents of the bill merely replied that the meaning of ***287** "discrimination" would be made clear by reference to the Constitution or other existing law. For example, Senator Humphrey noted the relevance of the Constitution:

FN23. See, e. g., *id.*, at 6052 (remarks of Sen. Johnston); 5863 (remarks of Sen. Eastland); 5612 (remarks of Sen. Ervin); 5251 (remarks of Sen. Talmadge); 1632 (remarks of Rep. Dowdy); 1619 (remarks of Rep. Abernethy).

"As I have said, the bill has a simple purpose. That purpose is to give fellow citizens--Negroes--the same rights and opportunities that white people take for granted. This is no more than what was preached by the prophets, and by Christ Himself. It is no more than what our Constitution guarantees." *Id.*, at 6553. [FN24]

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FN24. See also *id.*, at 7057, 13333 (remarks of Sen. Ribicoff); 7057 (remarks of Sen. Pastore); 5606-5607 (remarks of Sen. Javits); 5253, 5863-5864, 13442 (remarks of Sen. Humphrey).

[8] In view of the clear legislative intent, Title VI must be held to proscribe only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment.

III A

Petitioner does not deny that decisions based on race or ethnic origin by faculties and administrations of state universities are reviewable under the Fourteenth Amendment. See, e. g., *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337, 59 S.Ct. 232, 83 L.Ed. 208 (1938); *Sipuel v. Board of Regents*, 332 U.S. 631, 68 S.Ct. 299, 92 L.Ed. 247 (1948); *Sweatt v. Painter*, 339 U.S. 629, 70 S.Ct. 848, 94 L.Ed. 1114 (1950); *McLaurin v. Oklahoma State Regents*, 339 U.S. 637, 70 S.Ct. 851, 94 L.Ed. 1149 (1950). For his part, respondent does not argue that all racial or ethnic classifications are *per se* invalid. See, e. g., *Hirabayashi v. United States*, 320 U.S. 81, 63 S.Ct. 1375, 87 L.Ed. 1774 (1943); *Korematsu v. United States*, 323 U.S. 214, 65 S.Ct. 193, 89 L.Ed. 194 (1944); ***2747***Lee v. Washington*, 390 U.S. 333, 334, 88 S.Ct. 994, 995, 19 L.Ed.2d 1212 (1968) (Black, Harlan, and Stewart, JJ., concurring); *United Jewish Organizations v. Carey*, 430 U.S. 144, 97 S.Ct. 996, 51 L.Ed.2d 229 (1977). The parties do disagree as to the level of judicial scrutiny to be applied to the special admissions program. Petitioner argues that the court below erred in applying strict scrutiny, as this inexact term has been ***288** applied in our cases. That level of review, petitioner asserts, should be reserved for classifications that disadvantage "discrete and insular minorities." See *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n. 4, 58 S.Ct. 778, 783, 82 L.Ed. 1234 (1938). Respondent, on the other hand, contends that the California court correctly rejected the notion that the degree of judicial scrutiny accorded a particular racial or ethnic classification hinges upon membership in a

discrete and insular minority and duly recognized that the "rights established [by the Fourteenth Amendment] are personal rights." *Shelley v. Kraemer*, 334 U.S. 1, 22, 68 S.Ct. 836, 846, 92 L.Ed. 1161 (1948).

En route to this crucial battle over the scope of judicial review, [FN25] the parties fight a sharp preliminary action over the proper characterization of the special admissions program. Petitioner prefers to view it as establishing a "goal" of minority representation in the Medical School. Respondent, echoing the courts below, labels it a racial quota. [FN26]

FN25. That issue has generated a considerable amount of scholarly controversy. See, e. g., Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U.Chi.L.Rev. 723 (1974); Greenawalt, *Judicial Scrutiny of "Benign" Racial Preference in Law School Admissions*, 75 Colum.L.Rev. 559 (1975); Kaplan, *Equal Justice in an Unequal World: Equality for the Negro*, 61 Nw.U.L.Rev. 363 (1966); Karst & Horowitz, *Affirmative Action and Equal Protection*, 60 Va.L.Rev. 955 (1974); O'Neil, *Racial Preference and Higher Education: The Larger Context*, 60 Va.L.Rev. 925 (1974); Posner, *The DeFunis Case and the Constitutionality of Preferential Treatment of Racial Minorities*, 1974 Sup.Ct.Rev. 1; Redish, *Preferential Law School Admissions and the Equal Protection Clause: An Analysis of the Competing Arguments*, 22 UCLA L.Rev. 343 (1974); Sandalow, *Racial Preferences in Higher Education: Political Responsibility and the Judicial Role*, 42 U.Chi.L.Rev. 653 (1975); Sedler, *Racial Preference, Reality and the Constitution: Bakke v. Regents of the University of California*, 17 Santa Clara L.Rev. 329 (1977); Seeburger, *A Heuristic Argument Against Preferential Admissions*, 39 U.Pitt.L.Rev. 285 (1977).

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FN26. Petitioner defines "quota" as a requirement which must be met but can never be exceeded, regardless of the quality of the minority applicants. Petitioner declares that there is no "floor" under the total number of minority students admitted; completely unqualified students will not be admitted simply to meet a "quota." Neither is there a "ceiling," since an unlimited number could be admitted through the general admissions process. On this basis the special admissions program does not meet petitioner's definition of a quota.

The court below found--and petitioner does not deny--that white applicants could not compete for the 16 places reserved solely for the special admissions program. 18 Cal.3d, at 44, 132 Cal.Rptr., at 687, 553 P.2d, at 1159. Both courts below characterized this as a "quota" system.

***289** This semantic distinction is beside the point: The special admissions program is undeniably a classification based on race and ethnic background. To the extent that there existed a pool of at least minimally qualified minority applicants to fill the 16 special admissions seats, white applicants could compete only for 84 seats in the entering class, rather than the 100 open to minority applicants. Whether this limitation is described as a quota or a goal, it is a line drawn on the basis of race and ethnic status. [FN27]

FN27. Moreover, the University's special admissions program involves a purposeful, acknowledged use of racial criteria. This is not a situation in which the classification on its face is racially neutral, but has a disproportionate racial impact. In that situation, plaintiff must establish an intent to discriminate. *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 264-265, 97 S.Ct. 555, 562-563, 50 L.Ed.2d 450 (1977); *Washington v. Davis*, 426 U.S. 229, 242, 96 S.Ct. 2040, 2048, 48 L.Ed.2d 597 (1976); see *Yick Wo v. Hopkins*, 118 U.S. 356, 6 S.Ct.

1064, 30 L.Ed. 220 (1886).

[9] The guarantees of the Fourteenth Amendment extend to all persons. Its language ****2748** is explicit: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." It is settled beyond question that the "rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights." *Shelley v. Kraemer, supra*, at 22, 68 S.Ct., at 846. Accord, *Missouri ex rel. Gaines v. Canada, supra*, 305 U.S., at 351, 57 S.Ct., at 237; *McCabe v. Atchison, T. & S.F.R. Co.*, 235 U.S. 151, 161-162, 35 S.Ct. 69, 71, 59 L.Ed. 169 (1914). The guarantee of equal protection cannot mean one thing when applied to one individual and something else when ***290** applied to a person of another color. If both are not accorded the same protection, then it is not equal.

[10] Nevertheless, petitioner argues that the court below erred in applying strict scrutiny to the special admissions program because white males, such as respondent, are not a "discrete and insular minority" requiring extraordinary protection from the majoritarian political process. *Carolene Products Co., supra*, 304 U.S., at 152-153 n. 4, 58 S.Ct., at 783-784. This rationale, however, has never been invoked in our decisions as a prerequisite to subjecting racial or ethnic distinctions to strict scrutiny. Nor has this Court held that discreteness and insularity constitute necessary preconditions to a holding that a particular classification is invidious. [FN28] See, e. g., *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541, 62 S.Ct. 1110, 1113, 86 L.Ed. 1655 (1942); *Carrington v. Rash*, 380 U.S. 89, 94-97, 85 S.Ct. 775, 779-780, 13 L.Ed.2d 675 (1965). These characteristics may be relevant in deciding whether or not to add new types of classifications to the list of "suspect" categories or whether a particular classification survives close examination. See, e. g., *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 313, 96 S.Ct. 2562, 2566, 49 L.Ed.2d 520 (1976) (age); *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 28, 93 S.Ct. 1278, 1293, 36 L.Ed.2d 16 (1973) (wealth); *Graham v.*

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Richardson, 403 U.S. 365, 372, 91 S.Ct. 1848, 1852, 29 L.Ed.2d 534 (1971) (aliens). Racial and ethnic classifications, however, are subject to stringent examination without regard to these additional characteristics. We declared as much in the first cases explicitly to recognize racial distinctions as suspect:

FN28. After *Carolene Products*, the first specific reference in our decisions to the elements of "discreteness and insularity" appears in *Minersville School District v. Gobitis*, 310 U.S. 586, 606, 60 S.Ct. 1010, 1018, 84 L.Ed. 1375 (1940) (Stone, J., dissenting). The next does not appear until 1970. *Oregon v. Mitchell*, 400 U.S. 112, 295 n. 14, 91 S.Ct. 260, 349, 27 L.Ed.2d 91 (STEWART, J., concurring in part and dissenting in part). These elements have been relied upon in recognizing a suspect class in only one group of cases, those involving aliens. *E. g.*, *Graham v. Richardson*, 403 U.S. 365, 372, 91 S.Ct. 1848, 1852, 29 L.Ed.2d 534 (1971).

"Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people *291 whose institutions are founded upon the doctrine of equality." *Hirabayashi*, 320 U.S., at 100, 63 S.Ct., at 1385

"[A]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny." *Korematsu*, 323 U.S., at 216, 65 S.Ct., at 194.

The Court has never questioned the validity of those pronouncements. Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination.

B

This perception of racial and ethnic distinctions is rooted in our Nation's constitutional and demographic history. The Court's initial view of

the Fourteenth Amendment was that its "one pervading purpose" was "the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the **2749 oppressions of those who had formerly exercised dominion over him." *Slaughter-House Cases*, 16 Wall. 36, 71, 21 L.Ed. 394 (1873). The Equal Protection Clause, however, was "[v]irtually strangled in infancy by post-civil-war judicial reactionism." [FN29] It was relegated to decades of relative desuetude while the Due Process Clause of the Fourteenth Amendment, after a short germinal period, flourished as a cornerstone in the Court's defense of property and liberty of contract. See, *e. g.*, *Mugler v. Kansas*, 123 U.S. 623, 661, 8 S.Ct. 273, 297, 31 L.Ed. 205 (1887); *Allgeyer v. Louisiana*, 165 U.S. 578, 17 S.Ct. 427, 41 L.Ed. 832 (1897); *Lochner v. New York*, 198 U.S. 45, 25 S.Ct. 539, 49 L.Ed. 937 (1905). In that cause, the Fourteenth Amendment's "one pervading purpose" was displaced. See, *e. g.*, *Plessy v. Ferguson*, 163 U.S. 537, 16 S.Ct. 1138, 41 L.Ed. 256 (1896). It was only as the era of substantive due process came to a close, see, *e. g.*, *292 *Nebbia v. New York*, 291 U.S. 502, 54 S.Ct. 505, 78 L.Ed. 940 (1934); *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 57 S.Ct. 578, 81 L.Ed. 703 (1937), that the Equal Protection Clause began to attain a genuine measure of vitality, see, *e. g.*, *United States v. Carolene Products*, 304 U.S. 144, 58 S.Ct. 778, 82 L.Ed. 1234 (1938); *Skinner v. Oklahoma ex rel. Williamson*, *supra*.

FN29. Tussman & tenBroek, *The Equal Protection of the Laws*, 37 Calif.L.Rev. 341, 381 (1949).

By that time it was no longer possible to peg the guarantees of the Fourteenth Amendment to the struggle for equality of one racial minority. During the dormancy of the Equal Protection Clause, the United States had become a Nation of minorities. [FN30] Each had to struggle [FN31]--and to some extent struggles still [FN32]--to overcome the prejudices not of a monolithic majority, but of a "majority" composed of various minority groups of whom it was said--perhaps unfairly in many cases--that a shared characteristic was a willingness

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to disadvantage other groups. [FN33] As the Nation filled with the stock of many lands, the reach of the Clause was gradually extended to all ethnic groups seeking protection from official discrimination. See *Strauder v. West Virginia*, 100 U.S. 303, 308, 25 L.Ed. 664 (1880) (Celtic Irishmen) (dictum); *Yick Wo v. Hopkins*, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886) (Chinese); *Truax v. Raich*, 239 U.S. 33, 41, 36 S.Ct. 7, 10, 60 L.Ed. 131 (1915) (Austrian resident aliens); *Korematsu, supra* (Japanese); *Hernandez v. Texas*, 347 U.S. 475, 74 S.Ct. 667, 98 L.Ed. 866 (1954) (Mexican-Americans). The guarantees of equal protection, said the Court in *293 *Yick Wo*, "are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws." 118 U.S., at 369, 6 S.Ct., at 1070.

FN30. M. Jones, *American Immigration* 177-246 (1960).

FN31. J. Higham, *Strangers in the Land* (1955); G. Abbott, *The Immigrant and the Community* (1917); P. Roberts, *The New Immigration* 66-73, 86-91, 248-261 (1912). See also E. Fenton, *Immigrants and Unions: A Case Study* 561-562 (1975).

FN32. "Members of various religious and ethnic groups, primarily but not exclusively of Eastern, Middle, and Southern European ancestry, such as Jews, Catholics, Italians, Greeks, and Slavic groups, continue to be excluded from executive, middle-management, and other job levels because of discrimination based upon their religion and/or national origin." 41 CFR § 60-50.1(b) (1977).

FN33. E. g., Roberts, *supra* n. 31, at 75; Abbott, *supra* n. 31, at 270-271. See generally n. 31, *supra*.

Although many of the Framers of the Fourteenth

Amendment conceived of its primary function as bridging the vast distance between members of the Negro race and the white "majority," *Slaughter-House Cases, supra*, the Amendment itself was framed in universal terms, without reference to color, ethnic origin, or condition of prior servitude. As this Court recently remarked in interpreting the 1866 Civil Rights Act to extend to claims of racial discrimination against white persons, "the 39th Congress was intent upon establishing **2750 in the federal law a broader principle than would have been necessary simply to meet the particular and immediate plight of the newly freed Negro slaves." *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273, 296, 96 S.Ct. 2574, 2586, 49 L.Ed.2d 493 (1976). And that legislation was specifically broadened in 1870 to ensure that "all persons," not merely "citizens," would enjoy equal rights under the law. See *Runyon v. McCrary*, 427 U.S. 160, 192-202, 96 S.Ct. 2586, 2605-2609, 49 L.Ed.2d 415 (1976) (WHITE, J., dissenting). Indeed, it is not unlikely that among the Framers were many who would have applauded a reading of the Equal Protection Clause that states a principle of universal application and is responsive to the racial, ethnic, and cultural diversity of the Nation. See, e. g., Cong.Globe, 39th Cong., 1st Sess., 1056 (1866) (remarks of Rep. Niblack); *id.*, at 2891-2892 (remarks of Sen. Conness); *id.*, 40th Cong., 2d Sess., 883 (1868) (remarks of Sen. Howe) (Fourteenth Amendment "protect[s] classes from class legislation"). See also Bickel, *The Original Understanding and the Segregation Decision*, 69 Harv.L.Rev. 1, 60-63 (1955).

Over the past 30 years, this Court has embarked upon the crucial mission of interpreting the Equal Protection Clause with the view of assuring to all persons "the protection of *294 equal laws," *Yick Wo, supra*, 118 U.S., at 369, 6 S.Ct., at 1070, in a Nation confronting a legacy of slavery and racial discrimination. See, e. g., *Shelley v. Kraemer*, 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161 (1948); *Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954); *Hills v. Gautreaux*, 425 U.S. 284, 96 S.Ct. 1538, 47 L.Ed.2d 792 (1976). Because the landmark decisions in this area arose in

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response to the continued exclusion of Negroes from the mainstream of American society, they could be characterized as involving discrimination by the "majority" white race against the Negro minority. But they need not be read as depending upon that characterization for their results. It suffices to say that "[o]ver the years, this Court has consistently repudiated '[d]istinctions between citizens solely because of their ancestry' as being 'odious to a free people whose institutions are founded upon the doctrine of equality.'" *Loving v. Virginia*, 388 U.S. 1, 11, 87 S.Ct. 1817, 1823, 18 L.Ed.2d 1010 (1967), quoting *Hirabayashi*, 320 U.S., at 100, 63 S.Ct., at 1385.

Petitioner urges us to adopt for the first time a more restrictive view of the Equal Protection Clause and hold that discrimination against members of the white "majority" cannot be suspect if its purpose can be characterized as "benign." [FN34] *295 The clock of our liberties, however, cannot be turned back to 1868. *Brown v. Board of Education*, *supra*, 347 U.S., at 492, 74 S.Ct., at 690; accord, *Loving v. Virginia*, *supra*, 388 U.S., at 9, 87 S.Ct., at 1822. It is far too late to argue that the guarantee of equal protection **2751 to *all* persons permits the recognition of special wards entitled to a degree of protection greater than that accorded others. [FN35] "The Fourteenth Amendment is not directed solely against discrimination due to a 'two-class theory'—that is, based upon differences between 'white' and Negro." *Hernandez*, 347 U.S., at 478, 74 S.Ct., at 670.

FN34. In the view of Mr. Justice BRENNAN, Mr. Justice WHITE, Mr. Justice MARSHALL, and Mr. Justice BLACKMUN, the pliable notion of "stigma" is the crucial element in analyzing racial classifications. See, *e. g.*, *post*, at 2785. The Equal Protection Clause is not framed in terms of "stigma." Certainly the word has no clearly defined constitutional meaning. It reflects a subjective judgment that is standardless. *All* state-imposed classifications that rearrange burdens and benefits on the basis of race are likely to be viewed with deep

resentment by the individuals burdened. The denial to innocent persons of equal rights and opportunities may outrage those so deprived and therefore may be perceived as invidious. These individuals are likely to find little comfort in the notion that the deprivation they are asked to endure is merely the price of membership in the dominant majority and that its imposition is inspired by the supposedly benign purpose of aiding others. One should not lightly dismiss the inherent unfairness of, and the perception of mistreatment that accompanies, a system of allocating benefits and privileges on the basis of skin color and ethnic origin. Moreover, Mr. Justice BRENNAN, Mr. Justice WHITE, Mr. Justice MARSHALL, and Mr. Justice BLACKMUN offer no principle for deciding whether preferential classifications reflect a benign remedial purpose or a malevolent stigmatic classification, since they are willing in this case to accept mere *post hoc* declarations by an isolated state entity—a medical school faculty—unadorned by particularized findings of past discrimination, to establish such a remedial purpose.

FN35. Professor Bickel noted the self-contradiction of that view:

"The lesson of the great decisions of the Supreme Court and the lesson of contemporary history have been the same for at least a generation: discrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic society. Now this is to be unlearned and we are told that this is not a matter of fundamental principle but only a matter of whose ox is gored. Those for whom racial equality was demanded are to be more equal than others. Having found support in the Constitution for equality, they now claim support for inequality under the same Constitution." A. Bickel, *The Morality of*

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Consent 133 (1975).

Once the artificial line of a "two-class theory" of the Fourteenth Amendment is put aside, the difficulties entailed in varying the level of judicial review according to a perceived "preferred" status of a particular racial or ethnic minority are intractable. The concepts of "majority" and "minority" necessarily reflect temporary arrangements and political judgments. As observed above, the white "majority" itself is composed of various minority groups, most of which can lay claim to a history of prior discrimination at the hands of the State and private individuals. Not all of these groups can receive preferential treatment and corresponding judicial tolerance *296 of distinctions drawn in terms of race and nationality, for then the only "majority" left would be a new minority of white Anglo-Saxon Protestants. There is no principled basis for deciding which groups would merit "heightened judicial solicitude" and which would not. [FN36] Courts would be asked to evaluate the extent of the prejudice and consequent *297 harm suffered by various minority groups. Those whose societal injury is thought to exceed some arbitrary level of tolerability then would be entitled to preferential classifications at the expense of individuals belonging to other groups. Those classifications would be free from exacting judicial scrutiny. As these preferences began to have their desired effect, and the consequences of past discrimination were undone, new judicial rankings would be necessary. The kind of variable sociological and political **2752 analysis necessary to produce such rankings simply does not lie within the judicial competence--even if they otherwise were politically feasible and socially desirable. [FN37]

FN36. As I am in agreement with the view that race may be taken into account as a factor in an admissions program, I agree with my Brothers BRENNAN, WHITE, MARSHALL, and BLACKMUN that the portion of the judgment that would proscribe all consideration of race must be reversed. See Part V, *infra*. But I disagree with much that is said in their

opinion. They would require as a justification for a program such as petitioner's, only two findings: (i) that there has been some form of discrimination against the preferred minority groups by "society at large," *post*, at 2789 (it being conceded that petitioner had no history of discrimination), and (ii) that "there is reason to believe" that the disparate impact sought to be rectified by the program is the "product" of such discrimination:

"If it was reasonable to conclude--as we hold that it was--that the failure of minorities to qualify for admission at Davis under regular procedures was due principally to the effects of past discrimination, then there is a reasonable likelihood that, but for pervasive racial discrimination, respondent would have failed to qualify for admission even in the absence of Davis' special admissions program." *Post*, at 2787.

The breadth of this hypothesis is unprecedented in our constitutional system. The first step is easily taken. No one denies the regrettable fact that there has been societal discrimination in this country against various racial and ethnic groups. The second step, however, involves a speculative leap: but for this discrimination by society at large, Bakke "would have failed to qualify for admission" because Negro applicants--nothing is said about Asians, cf., *e. g.*, *post*, at 2791 n. 57--would have made better scores. Not one word in the record supports this conclusion, and the authors of the opinion offer no standard for courts to use in applying such a presumption of causation to other racial or ethnic classifications. This failure is a grave one, since if it may be concluded *on this record* that each of the minority groups preferred by the petitioner's special program is entitled to the benefit of the presumption, it would seem difficult to determine that any of the dozens of minority groups that have suffered "societal discrimination"

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cannot also claim it, in any area of social intercourse. See Part IV-B, *infra*.

FN37. Mr. Justice Douglas has noted the problems associated with such inquiries:

"The reservation of a proportion of the law school class for members of selected minority groups is fraught with . . . dangers, for one must immediately determine which groups are to receive such favored treatment and which are to be excluded, the proportions of the class that are to be allocated to each, and even the criteria by which to determine whether an individual is a member of a favored group. [Cf. *Plessy v. Ferguson*, 163 U.S. 537, 549, 552, 16 S.Ct. 1138, 1142, 1143, 41 L.Ed. 256 (1896).] There is no assurance that a common agreement can be reached, and first the schools, and then the courts, will be buffeted with the competing claims. The University of Washington included Filipinos, but excluded Chinese and Japanese; another school may limit its program to blacks, or to blacks and Chicanos. Once the Court sanctioned racial preferences such as these, it could not then wash its hands of the matter, leaving it entirely in the discretion of the school, for then we would have effectively overruled *Sweatt v. Painter*, 339 U.S. 629, 70 S.Ct. 848, 94 L.Ed. 620, and allowed imposition of a 'zero' allocation. But what standard is the Court to apply when a rejected applicant of Japanese ancestry brings suit to require the University of Washington to extend the same privileges to his group? The Committee might conclude that the population of Washington is now 2% Japanese, and that Japanese also constitute 2% of the Bar, but that had they not been handicapped by a history of discrimination, Japanese would now constitute 5% of the Bar, or 20%. Or, alternatively, the Court could attempt to assess how grievously each group has suffered from discrimination, and allocate proportions accordingly; if that were the

standard the current University of Washington policy would almost surely fall, for there is no Western State which can claim that it has always treated Japanese and Chinese in a fair and evenhanded manner. See, e. g., *Yick Wo v. Hopkins*, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220; *Terrace v. Thompson*, 263 U.S. 197, 44 S.Ct. 15, 68 L.Ed. 255; *Oyama v. California*, 332 U.S. 633, 68 S.Ct. 269, 92 L.Ed. 249. This Court has not sustained a racial classification since the wartime cases of *Korematsu v. United States*, 323 U.S. 214, 65 S.Ct. 193, 89 L.Ed. 194, and *Hirabayashi v. United States*, 320 U.S. 81, 63 S.Ct. 1375, 87 L.Ed. 1774, involving curfews and relocations imposed upon Japanese-Americans.

"Nor obviously will the problem be solved if next year the Law School included only Japanese and Chinese, for then Norwegians and Swedes, Poles and Italians, Puerto Ricans and Hungarians, and all other groups which form this diverse Nation would have just complaints." *DeFunis v. Odegaard*, 416 U.S. 312, 337-340, 94 S.Ct. 1704, 1716, 1717, 40 L.Ed.2d 164 (1974) (dissenting opinion) (footnotes omitted).

*298 Moreover, there are serious problems of justice connected with the idea of preference itself. First, it may not always be clear that a so-called preference is in fact benign. Courts may be asked to validate burdens imposed upon individual members of a particular group in order to advance the group's general interest. See *United Jewish Organizations v. Carey*, 430 U.S., at 172-173, 97 S.Ct., at 1013. (BRENNAN, J., concurring in part). Nothing in the Constitution supports the notion that individuals may be asked to suffer otherwise impermissible burdens in order to enhance the societal standing of their ethnic groups. Second, preferential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relationship to individual worth. See *DeFunis v.*

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Odegaard, 416 U.S. 312, 343, 94 S.Ct. 1704, 1719, 40 L.Ed.2d 164 (1974) (Douglas, J., dissenting). Third, there is a measure of inequity in forcing innocent persons in respondent's position to bear the burdens of redressing grievances not of their making.

By hitching the meaning of the Equal Protection Clause to these transitory considerations, we would be holding, as a constitutional principle, that judicial scrutiny of classifications touching on racial and ethnic background may vary with the ebb and flow of political forces. Disparate constitutional tolerance of such classifications well may serve to exacerbate *299 racial and ethnic antagonisms rather than alleviate them. *United Jewish Organizations, supra*, 430 U.S., at 173-174, 97 S.Ct., at 1013-1014 (BRENNAN, J., concurring in part). Also, the mutability of a constitutional principle, based upon shifting political and social judgments, undermines the chances for consistent application of the Constitution from **2753 one generation to the next, a critical feature of its coherent interpretation. *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429, 650-651, 15 S.Ct. 673, 716, 39 L.Ed. 759 (1895) (White, J., dissenting). In expounding the Constitution, the Court's role is to discern "principles sufficiently absolute to give them roots throughout the community and continuity over significant periods of time, and to lift them above the level of the pragmatic political judgments of a particular time and place." A. Cox, *The Role of the Supreme Court in American Government* 114 (1976).

If it is the individual who is entitled to judicial protection against classifications based upon his racial or ethnic background because such distinctions impinge upon personal rights, rather than the individual only because of his membership in a particular group, then constitutional standards may be applied consistently. Political judgments regarding the necessity for the particular classification may be weighed in the constitutional balance, *Korematsu v. United States*, 323 U.S. 214, 65 S.Ct. 193, 89 L.Ed. 194 (1944), but the standard of justification will remain constant. This is as it should be, since those political judgments are the

product of rough compromise struck by contending groups within the democratic process. [FN38]

When they touch upon an individual's race or ethnic background, he is entitled to a judicial determination that the burden he is asked to bear on that basis is precisely tailored to serve a compelling governmental interest. The Constitution guarantees that right to every person regardless of his background. *Shelley v. Kraemer*, 334 U.S., at 22, 68 S.Ct., at 846; *Missouri ex rel. Gaines v. Canada*, 305 U.S., at 351, 59 S.Ct., at 237.

FN38. R. Dahl, *A Preface to Democratic Theory* (1956); Posner, *supra* n. 25, at 27.

*300 C

Petitioner contends that on several occasions this Court has approved preferential classifications without applying the most exacting scrutiny. Most of the cases upon which petitioner relies are drawn from three areas: school desegregation, employment discrimination, and sex discrimination. Each of the cases cited presented a situation materially different from the facts of this case.

The school desegregation cases are inapposite. Each involved remedies for clearly determined constitutional violations. *E. g.*, *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971); *McDaniel v. Barresi*, 402 U.S. 39, 91 S.Ct. 1287, 28 L.Ed.2d 582 (1971); *Green v. County School Board*, 391 U.S. 430, 88 S.Ct. 1689, 20 L.Ed.2d 716 (1968). Racial classifications thus were designed as remedies for the vindication of constitutional entitlement. [FN39] Moreover, the scope of the remedies was not permitted to exceed the extent of the *301 violations. **2754E. *g.*, *Dayton Board of Education v. Brinkman*, 433 U.S. 406, 97 S.Ct. 2766, 53 L.Ed.2d 851 (1977); *Milliken v. Bradley*, 418 U.S. 717, 94 S.Ct. 3112, 41 L.Ed.2d 1069 (1974); see *Pasadena City Board of Education v. Spangler*, 427 U.S. 424, 96 S.Ct. 2697, 49 L.Ed.2d 599 (1976). See also *Austin Independent School Dist. v. United States*, 429 U.S. 990, 991-995, 97 S.Ct. 517-519, 50 L.Ed.2d 603 (1976) (POWELL, J., concurring). Here, there was

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no judicial determination of constitutional violation as a predicate for the formulation of a remedial classification.

FN39. Petitioner cites three lower court decisions allegedly deviating from this general rule in school desegregation cases: *Offermann v. Nitkowski*, 378 F.2d 22 (C.A.2 1967); *Wanner v. County School Board*, 357 F.2d 452 (C.A.4 1966); *Springfield School Committee v. Barksdale*, 348 F.2d 261 (C.A.1 1965). Of these, *Wanner* involved a school system held to have been *de jure* segregated and enjoined from maintaining segregation; racial districting was deemed necessary. 357 F.2d, at 454. Cf. *United Jewish Organizations v. Carey*, 430 U.S. 144, 97 S.Ct. 996, 51 L.Ed.2d 229 (1977). In *Barksdale* and *Offermann*, courts did approve voluntary districting designed to eliminate discriminatory attendance patterns. In neither, however, was there any showing that the school board planned extensive pupil transportation that might threaten liberty or privacy interests. See *Keyes v. School District No. 1*, 413 U.S. 189, 240-250, 93 S.Ct. 2686, 2713, 2718, 37 L.Ed.2d 548 (1973) (POWELL, J., concurring in part and dissenting in part). Nor were white students deprived of an equal opportunity for education. Respondent's position is wholly dissimilar to that of a pupil bused from his neighborhood school to a comparable school in another neighborhood in compliance with a desegregation decree. Petitioner did not arrange for respondent to attend a different medical school in order to desegregate Davis Medical School; instead, it denied him admission and may have deprived him altogether of a medical education.

The employment discrimination cases also do not advance petitioner's cause. For example, in *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 96 S.Ct. 1251, 47 L.Ed.2d 444 (1976), we approved a

retroactive award of seniority to a class of Negro truckdrivers who had been the victims of discrimination--not just by society at large, but by the respondent in that case. While this relief imposed some burdens on other employees, it was held necessary "to make [the victims] whole for injuries suffered on account of unlawful employment discrimination." *Id.*, at 763, 96 S.Ct., at 1264, quoting *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418, 95 S.Ct. 2362, 2372, 45 L.Ed.2d 280 (1975). The Courts of Appeals have fashioned various types of racial preferences as remedies for constitutional or statutory violations resulting in identified, race-based injuries to individuals held entitled to the preference. *E. g.*, *Bridgeport Guardians, Inc. v. Bridgeport Civil Service Commission*, 482 F.2d 1333 (CA2 1973); *Carter v. Gallagher*, 452 F.2d 315 (CA8 1972), modified on rehearing en banc, *id.*, at 327. Such preferences also have been upheld where a legislative or administrative body charged with the responsibility made determinations of past discrimination by the industries affected, and fashioned remedies deemed appropriate to rectify the discrimination. *E. g.*, *Contractors Association of Eastern Pennsylvania v. Secretary of Labor*, 442 F.2d 159 (C.A.3), cert. denied, 404 U.S. 854, 92 S.Ct. 98, 30 L.Ed.2d 95 (1971); [FN40] **302Associated General Contractors of Massachusetts, Inc. v. Altshuler*, 490 F.2d 9 (C.A.1 1973), cert. denied, 416 U.S. 957, 94 S.Ct. 1971, 40 L.Ed.2d 307 (1974); cf. *Katzenbach v. Morgan*, 384 U.S. 641, 86 S.Ct. 1717, 16 L.Ed.2d 828 (1966). But we have never approved preferential classifications in the absence of proved constitutional or statutory violations. [FN41]

FN40. Every decision upholding the requirement of preferential hiring under the authority of Exec. Order No. 11246, 3 CFR 339 (1964-1965 Comp.), has emphasized the existence of previous discrimination as a predicate for the imposition of a preferential remedy. *Contractors Association of Eastern Pennsylvania; Southern Illinois Builders Assn. v. Ogilvie*, 471 F.2d 680 (C.A.7 1972); *Joyce v. McCrane*, 320 F.Supp. 1284 (NJ 1970); *Weiner v. Cuyahoga*

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Community College District, 19 Ohio St.2d 35, 249 N.E.2d 907, cert. denied, 396 U.S. 1004, 90 S.Ct. 554, 24 L.Ed.2d 495 (1970). See also *Rosetti Contracting Co. v. Brennan*, 508 F.2d 1039, 1041 (C.A.7 1975); *Associated General Contractors of Massachusetts, Inc. v. Altshuler*, 490 F.2d 9 (C.A.1 1973), cert. denied, 416 U.S. 957, 94 S.Ct. 1971, 40 L.Ed.2d 307 (1974); *Northeast Constr. Co. v. Romney*, 157 U.S.App.D.C. 381, 383, 390, 485 F.2d 752, 754, 761 (1973).

FN41. This case does not call into question congressionally authorized administrative actions, such as consent decrees under Title VII or approval of reapportionment plans under § 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c (1970 ed., Supp. V). In such cases, there has been detailed legislative consideration of the various indicia of previous constitutional or statutory violations, *e. g.*, *South Carolina v. Katzenbach*, 383 U.S. 301, 308-310, 86 S.Ct. 803, 808-809, 15 L.Ed.2d 769 (1966) (§ 5), and particular administrative bodies have been charged with monitoring various activities in order to detect such violations and formulate appropriate remedies. See *Hampton v. Mow Sun Wong*, 426 U.S. 88, 103, 96 S.Ct. 1895, 1905, 48 L.Ed.2d 495 (1976). Furthermore, we are not here presented with an occasion to review legislation by Congress pursuant to its powers under § 2 of the Thirteenth Amendment and § 5 of the Fourteenth Amendment to remedy the effects of prior discrimination. *Katzenbach v. Morgan*, 384 U.S. 641, 86 S.Ct. 1717, 16 L.Ed.2d 828 (1966); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 88 S.Ct. 2186, 20 L.Ed.2d 1189 (1968). We have previously recognized the special competence of Congress to make findings with respect to the effects of identified past discrimination and its discretionary authority to take appropriate remedial measures.

Nor is petitioner's view as to the applicable standard supported by the fact that **2755 gender-based classifications are not subjected to this level of scrutiny. *E. g.*, *Califano v. Webster*, 430 U.S. 313, 316-317, 97 S.Ct. 1192, 1194-1195, 51 L.Ed.2d 360 (1977); *Craig v. Boren*, 429 U.S. 190, 211, 97 S.Ct. 451, 464, 50 L.Ed.2d 397 (1976) (POWELL, J., concurring). Gender-based distinctions are less likely to create the analytical and practical problems *303 present in preferential programs premised on racial or ethnic criteria. With respect to gender there are only two possible classifications. The incidence of the burdens imposed by preferential classifications is clear. There are no rival groups which can claim that they, too, are entitled to preferential treatment. Classwide questions as to the group suffering previous injury and groups which fairly can be burdened are relatively manageable for reviewing courts. See, *e. g.*, *Califano v. Goldfarb*, 430 U.S. 199, 212-217, 97 S.Ct. 1021, 1029-1032, 51 L.Ed.2d 270 (1977); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 645, 95 S.Ct. 1225, 1231, 43 L.Ed.2d 514 (1975). The resolution of these same questions in the context of racial and ethnic preferences presents far more complex and intractable problems than gender-based classifications. More importantly, the perception of racial classifications as inherently odious stems from a lengthy and tragic history that gender-based classifications do not share. In sum, the Court has never viewed such classification as inherently suspect or as comparable to racial or ethnic classifications for the purpose of equal protection analysis.

Petitioner also cites *Lau v. Nichols*, 414 U.S. 563, 94 S.Ct. 786, 39 L.Ed.2d 1 (1974), in support of the proposition that discrimination favoring racial or ethnic minorities has received judicial approval without the exacting inquiry ordinarily accorded "suspect" classifications. In *Lau*, we held that the failure of the San Francisco school system to provide remedial English instruction for some 1,800 students of oriental ancestry who spoke no English amounted to a violation of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, and the regulations promulgated thereunder. Those

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regulations required remedial instruction where inability to understand English excluded children of foreign ancestry from participation in educational programs. 414 U.S., at 568, 94 S.Ct., at 789. Because we found that the students in *Lau* were denied "a meaningful opportunity to participate in the educational program," *ibid.*, we remanded for the fashioning of a remedial order.

*304 *Lau* provides little support for petitioner's argument. The decision rested solely on the statute, which had been construed by the responsible administrative agency to reach educational practices "which have the effect of subjecting individuals to discrimination," *ibid.* We stated: "Under these state-imposed standards there is no equality of treatment merely by providing students with the same facilities, textbooks, teachers, and curriculum; for students who do not understand English are effectively foreclosed from any meaningful education." *Id.*, at 566, 94 S.Ct., at 788. Moreover, the "preference" approved did not result in the denial of the relevant benefit--"meaningful opportunity to participate in the educational program"--to anyone else. No other student was deprived by that preference of the ability to participate in San Francisco's school system, and the applicable regulations required similar assistance for all students who suffered similar linguistic deficiencies. *Id.*, at 570-571, 94 S.Ct., at 790 (STEWART, J., concurring in result).

In a similar vein, [FN42] petitioner contends that our recent decision in **2756 *United Jewish Organizations v. Carey*, 430 U.S. 144, 97 S.Ct. 996, 51 L.Ed.2d 229 (1977), indicates a willingness to approve racial classifications designed to benefit certain minorities, without denominating the classifications as "suspect." The State of New York had redrawn its reapportionment plan to meet objections of the Department of Justice under § 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c (1970 ed., Supp. V). Specifically, voting districts were redrawn to enhance the electoral power *305 of certain "nonwhite" voters found to have been the victims of unlawful "dilution" under the original reapportionment plan. *United Jewish Organizations*, like *Lau*, properly is viewed as a

case in which the remedy for an administrative finding of discrimination encompassed measures to improve the previously disadvantaged group's ability to participate, without excluding individuals belonging to any other group from enjoyment of the relevant opportunity--meaningful participation in the electoral process.

FN42. Petitioner also cites our decision in *Morton v. Mancari*, 417 U.S. 535, 94 S.Ct. 2474, 41 L.Ed.2d 290 (1974), for the proposition that the State may prefer members of traditionally disadvantaged groups. In *Mancari*, we approved a hiring preference for qualified Indians in the Bureau of Indian Affairs of the Department of the Interior (BIA). We observed in that case, however, that the legal status of the BIA is *sui generis*. *Id.*, at 554, 94 S.Ct., at 2484. Indeed, we found that the preference was not racial at all, but "an employment criterion reasonably designed to further the cause of Indian self-government and to make the BIA more responsive to the needs of its constituent . . . groups . . . whose lives and activities are governed by the BIA in a unique fashion." *Ibid.*

In this case, unlike *Lau* and *United Jewish Organizations*, there has been no determination by the legislature or a responsible administrative agency that the University engaged in a discriminatory practice requiring remedial efforts. Moreover, the operation of petitioner's special admissions program is quite different from the remedial measures approved in those cases. It prefers the designated minority groups at the expense of other individuals who are totally foreclosed from competition for the 16 special admissions seats in every Medical School class. Because of that foreclosure, some individuals are excluded from enjoyment of a state-provided benefit--admission to the Medical School--they otherwise would receive. When a classification denies an individual opportunities or benefits enjoyed by others solely because of his race or ethnic background, it must be regarded as suspect.

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E. g., McLaurin v. Oklahoma State Regents, 339 U.S., at 641-642, 70 S.Ct., at 853-854.

IV

We have held that in "order to justify the use of a suspect classification, a State must show that its purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is 'necessary . . . to the accomplishment' of its purpose or the safeguarding of its interest." *In re Griffiths*, 413 U.S. 717, 721-722, 93 S.Ct. 2851, 2855, 37 L.Ed.2d 910 (1973) (footnotes omitted); *Loving v. Virginia*, 388 U.S., at 11, 87 S.Ct., at 1823; *McLaughlin v. Florida*, 379 U.S. 184, 196, 85 S.Ct. 283, 290, 13 L.Ed.2d 222 (1964). The special admissions *306 program purports to serve the purposes of: (i) "reducing the historic deficit of traditionally disfavored minorities in medical schools and in the medical profession," Brief for Petitioner 32; (ii) countering the effects of societal discrimination; [FN43] (iii) increasing **2757 the number of physicians who will practice in communities currently underserved; and (iv) obtaining the educational benefits that flow from an ethnically diverse student body. It is necessary to decide which, if any, of these purposes is substantial enough to support the use of a suspect classification.

FN43. A number of distinct subgoals have been advanced as falling under the rubric of "compensation for past discrimination." For example, it is said that preferences for Negro applicants may compensate for harm done them personally, or serve to place them at economic levels they might have attained but for discrimination against their forebears. Greenawalt, *supra* n. 25, at 581-586. Another view of the "compensation" goal is that it serves as a form of reparation by the "majority" to a victimized group as a whole. B. Bittker, *The Case for Black Reparations* (1973). That justification for racial or ethnic preference has been subjected to much criticism. *E. g.*, Greenawalt, *supra* n. 25, at 581; Posner, *supra*, n. 25 at 16-17, and

n. 33. Finally, it has been argued that ethnic preferences "compensate" the group by providing examples of success whom other members of the group will emulate, thereby advancing the group's interest and society's interest in encouraging new generations to overcome the barriers and frustrations of the past. Redish, *supra* n. 25, at 391. For purposes of analysis these subgoals need not be considered separately.

Racial classifications in admissions conceivably could serve a fifth purpose, one which petitioner does not articulate: fair appraisal of each individual's academic promise in the light of some cultural bias in grading or testing procedures. To the extent that race and ethnic background were considered only to the extent of curing established inaccuracies in predicting academic performance, it might be argued that there is no "preference" at all. Nothing in this record, however, suggests either that any of the quantitative factors considered by the Medical School were culturally biased or that petitioner's special admissions program was formulated to correct for any such biases. Furthermore, if race or ethnic background were used solely to arrive at an unbiased prediction of academic success, the reservation of fixed numbers of seats would be inexplicable.

*307 A

[11] If petitioner's purpose is to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin, such a preferential purpose must be rejected not as insubstantial but as facially invalid. Preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake. This the Constitution forbids. *E. g.*, *Loving v. Virginia*, *supra*, 388 U.S., at 11, 87 S.Ct., at 1823; *McLaughlin v. Florida*, *supra*, 379 U.S., at 196, 85 S.Ct., at 290; *Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954).

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B

The State certainly has a legitimate and substantial interest in ameliorating, or eliminating where feasible, the disabling effects of identified discrimination. The line of school desegregation cases, commencing with *Brown*, attests to the importance of this state goal and the commitment of the judiciary to affirm all lawful means toward its attainment. In the school cases, the States were required by court order to redress the wrongs worked by specific instances of racial discrimination. That goal was far more focused than the remedying of the effects of "societal discrimination," an amorphous concept of injury that may be ageless in its reach into the past.

[12] We have never approved a classification that aids persons perceived as members of relatively victimized groups at the expense of other innocent individuals in the absence of judicial, legislative, or administrative findings of constitutional or statutory violations. See, e. g., *Teamsters v. United States*, 431 U.S. 324, 367-376, 97 S.Ct. 1843, 1870-1875, 52 L.Ed.2d 396 (1977); *United Jewish Organizations*, 430 U.S., at 155-156, 97 S.Ct., at 1004-1005; *South Carolina v. Katzenbach*, 383 U.S. 301, 308, 86 S.Ct. 803, 808, 15 L.Ed.2d 769 (1966). After such findings have been made, the governmental interest in preferring members of the injured groups at the expense of others is substantial, since the legal rights of the victims must be vindicated. In such a case, the *308 extent of the injury and the consequent remedy will have been judicially, legislatively, or administratively defined. Also, the remedial action usually remains subject to continuing oversight to assure that it will work the least harm possible to other innocent persons competing for the benefit. Without such findings of constitutional or statutory violations, [FN44] it cannot be *309 said that **2758 the government has any greater interest in helping one individual than in refraining from harming another. Thus, the government has no compelling justification for inflicting such harm.

FN44. Mr. Justice BRENNAN, Mr. Justice WHITE, Mr. Justice MARSHALL, and Mr. Justice BLACKMUN misconceive the

scope of this Court's holdings under Title VII when they suggest that "disparate impact" alone is sufficient to establish a violation of that statute and, by analogy, other civil rights measures. See *post*, at 2786-2787, and n. 42. That this was not the meaning of Title VII was made quite clear in the seminal decision in this area, *Griggs v. Duke Power Co.*, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971):

"Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed. What is required by Congress is the removal of *artificial, arbitrary, and unnecessary barriers* to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification." *Id.*, at 431, 91 S.Ct., at 853 (emphasis added).

Thus, disparate impact is a basis for relief under Title VII only if the practice in question is not founded on "business necessity," *ibid.*, or lacks "a manifest relationship to the employment in question," *id.*, at 432, 91 S.Ct., at 854. See also *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-803, 805-806, 93 S.Ct. 1817, 1824, 1825, 1826, 36 L.Ed.2d 668 (1973). Nothing in *this record*--as opposed to some of the general literature cited by Mr. Justice BRENNAN, Mr. Justice WHITE, Mr. Justice MARSHALL, and Mr. Justice BLACKMUN--even remotely suggests that the disparate impact of the general admissions program at Davis Medical School, resulting primarily from the sort of disparate test scores and grades set forth in n. 7, *supra*, is without educational justification.

Moreover, the presumption in *Griggs*--that disparate impact without any showing of business justification established the existence of discrimination in violation of the statute--was based on legislative determinations, wholly absent here, that past discrimination had

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handicapped various minority groups to such an extent that disparate impact could be traced to identifiable instances of past discrimination:

"[Congress sought] to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees. Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices." *Griggs, supra*, 401 U.S., at 429-430, 91 S.Ct., at 853.

See, e. g., H.R.Rep. No. 914, 88th Cong., 1st Sess., pt. 2, p. 26 (1963) ("Testimony supporting the fact of discrimination in employment is overwhelming"). See generally Vaas, Title VII: The Legislative History, 7 B.C.Ind. & Com.L.Rev. 431 (1966). The Court emphasized that "the Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group." 401 U.S., at 430-431, 91 S.Ct., at 853. Indeed, § 703(j) of the Act makes it clear that preferential treatment for an individual or minority group to correct an existing "imbalance" may not be required under Title VII. 42 U.S.C. § 2000e-2(j). Thus, Title VII principles support the proposition that findings of identified discrimination must precede the fashioning of remedial measures embodying racial classifications.

Petitioner does not purport to have made, and is in no position to make, such findings. Its broad mission is education, not the formulation of any legislative policy or the adjudication of particular claims of illegality. For reasons similar to those stated in Part III of this opinion, isolated segments of our vast governmental structures are not competent to make those decisions, at least in the absence of legislative mandates and legislatively determined criteria. [FN45] Cf. *Hampton v. Mow*

Sun Wong, 426 U.S. 88, 96 S.Ct. 1895, 48 L.Ed.2d 495 (1976); n. 41, *supra*. Before relying upon these sorts of findings in establishing a racial classification, a governmental body must have the authority and capability to establish, in the record, that the classification is responsive to identified discrimination. See, e. g., *Califano v. Webster*, 430 U.S., at 316-321, 97 S.Ct., at 1194-1197; *310 *Califano v. Goldfarb*, 430 U.S., at 212-217, 97 S.Ct., at 1029-1032. Lacking this capability, petitioner has not carried its burden of justification on this issue.

FN45. For example, the University is unable to explain its selection of only the four favored groups--Negroes, Mexican-Americans, American-Indians, and Asians--for preferential treatment. The inclusion of the last group is especially curious in light of the substantial numbers of Asians admitted through the regular admissions process. See also n. 37, *supra*.

[13] Hence, the purpose of helping certain groups whom the faculty of the Davis Medical School perceived as victims of "societal discrimination" does not justify a classification that imposes disadvantages upon persons like respondent, who bear no responsibility for whatever harm the beneficiaries of the special admissions program are thought to have suffered. To hold otherwise would be to convert a remedy heretofore reserved for violations of legal rights into a privilege that all institutions throughout the Nation could grant at their pleasure to whatever groups are perceived as victims of societal discrimination. That is a step we have never approved. Cf. *Pasadena City Board of Education v. Spangler*, 427 U.S. 424, 96 S.Ct. 2697, 49 L.Ed.2d 599 (1976).

C

Petitioner identifies, as another purpose of its program, improving the delivery of **2759 health-care services to communities currently underserved. It may be assumed that in some situations a State's interest in facilitating the health care of its citizens is sufficiently compelling to

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support the use of a suspect classification. But there is virtually no evidence in the record indicating that petitioner's special admissions program is either needed or geared to promote that goal. [FN46] The court below addressed this failure of proof:

FN46. The only evidence in the record with respect to such underservice is a newspaper article. Record 473.

"The University concedes it cannot assure that minority doctors who entered under the program, all of whom expressed an 'interest' in practicing in a disadvantaged community, will actually do so. It may be correct to assume that some of them will carry out this intention, and that it is more likely they will practice in minority *311 communities than the average white doctor. (See Sandalow, *Racial Preferences in Higher Education: Political Responsibility and the Judicial Role* (1975) 42 U.Chi.L.Rev. 653, 688). Nevertheless, there are more precise and reliable ways to identify applicants who are genuinely interested in the medical problems of minorities than by race. An applicant of whatever race who has demonstrated his concern for disadvantaged minorities in the past and who declares that practice in such a community is his primary professional goal would be more likely to contribute to alleviation of the medical shortage than one who is chosen entirely on the basis of race and disadvantage. In short, there is no empirical data to demonstrate that any one race is more selflessly socially oriented or by contrast that another is more selfishly acquisitive." 18 Cal.3d, at 56, 132 Cal.Rptr., at 695, 553 P.2d, at 1167.

Petitioner simply has not carried its burden of demonstrating that it must prefer members of particular ethnic groups over all other individuals in order to promote better health-care delivery to deprived citizens. Indeed, petitioner has not shown that its preferential classification is likely to have any significant effect on the problem. [FN47]

FN47. It is not clear that petitioner's

two-track system, even if adopted throughout the country, would substantially increase representation of blacks in the medical profession. That is the finding of a recent study by Sleeth & Mishell, *Black Under-Representation in United States Medical Schools*, 297 New England J. of Med. 1146 (1977). Those authors maintain that the cause of black underrepresentation lies in the small size of the national pool of qualified black applicants. In their view, this problem is traceable to the poor premedical experiences of black undergraduates, and can be remedied effectively only by developing remedial programs for black students before they enter college.

D

[14] The fourth goal asserted by petitioner is the attainment of a diverse student body. This clearly is a constitutionally permissible *312 goal for an institution of higher education. Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment. The freedom of a university to make its own judgments as to education includes the selection of its student body. Mr. Justice Frankfurter summarized the "four essential freedoms" that constitute academic freedom:

"It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail 'the four essential freedoms' of a university--to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.'" *Sweezy v. New Hampshire*, 354 U.S. 234, 263, 77 S.Ct. 1203, 1218, 1 L.Ed.2d 1311 (1957) (concurring in result).

Our national commitment to the safeguarding of these freedoms within university communities was emphasized in *Keyishian v. Board of Regents*, 385 U.S. 589, 603, 87 S.Ct. 675, 683, 17 L.Ed.2d 629 (1967):

**2760 "Our Nation is deeply committed to

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safeguarding academic freedom which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.' *United States v. Associated Press*, D.C., 52 F.Supp. 362, 372."

The atmosphere of "speculation, experiment and creation"--so essential to the quality of higher education--is widely believed to be promoted by a diverse student body. [FN48] As the Court *313 noted in *Keyishian*, it is not too much to say that the "nation's future depends upon leaders trained through wide exposure" to the ideas and mores of students as diverse as this Nation of many peoples.

FN48. The president of Princeton University has described some of the benefits derived from a diverse student body:

"[A] great deal of learning occurs informally. It occurs through interactions among students of both sexes; of different races, religions, and backgrounds; who come from cities and rural areas, from various states and countries; who have a wide variety of interests, talents, and perspectives; and who are able, directly or indirectly, to learn from their differences and to stimulate one another to reexamine even their most deeply held assumptions about themselves and their world. As a wise graduate of ours observed in commenting on this aspect of the educational process, 'People do not learn very much when they are surrounded only by the likes of themselves.'

"In the nature of things, it is hard to know how, and when, and even if, this informal 'learning through diversity' actually occurs. It does not occur for everyone. For many, however, the unplanned, casual

encounters with roommates, fellow sufferers in an organic chemistry class, student workers in the library, teammates on a basketball squad, or other participants in class affairs or student government can be subtle and yet powerful sources of improved understanding and personal growth." Bowen, *Admissions and the Relevance of Race*, *Princeton Alumni Weekly* 7, 9 (Sept. 26, 1977).

Thus, in arguing that its universities must be accorded the right to select those students who will contribute the most to the "robust exchange of ideas," petitioner invokes a countervailing constitutional interest, that of the First Amendment. In this light, petitioner must be viewed as seeking to achieve a goal that is of paramount importance in the fulfillment of its mission.

It may be argued that there is greater force to these views at the undergraduate level than in a medical school where the training is centered primarily on professional competency. But even at the graduate level, our tradition and experience lend support to the view that the contribution of diversity is substantial. In *Sweatt v. Painter*, 339 U.S., at 634, 70 S.Ct., at 850, the *314 Court made a similar point with specific reference to legal education:

"The law school, the proving ground for legal learning and practice, cannot be effective in isolation from the individuals and institutions with which the law interacts. Few students and no one who has practiced law would choose to study in an academic vacuum, removed from the interplay of ideas and the exchange of views with which the law is concerned."

Physicians serve a heterogeneous population. An otherwise qualified medical student with a particular background--whether it be ethnic, geographic, culturally advantaged or disadvantaged--may bring to a professional school of medicine experiences, outlooks, and ideas that enrich the training of its student body and better equip its graduates to render with understanding their vital service to humanity. [FN49]

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FN49. Graduate admissions decisions, like those at the undergraduate level, are concerned with "assessing the potential contributions to the society of each individual candidate following his or her graduation-- contributions defined in the broadest way to include the doctor and the poet, the most active participant in business or government affairs and the keenest critic of all things organized, the solitary scholar and the concerned parent." *Id.*, at 10.

Ethnic diversity, however, is only one element in a range of factors a university ****2761** properly may consider in attaining the goal of a heterogeneous student body. Although a university must have wide discretion in making the sensitive judgments as to who should be admitted, constitutional limitations protecting individual rights may not be disregarded. Respondent urges--and the courts below have held--that petitioner's dual admissions program is a racial classification that impermissibly infringes his rights under the Fourteenth Amendment. As the interest of diversity is compelling in the context of a university's admissions program, the question remains whether the ***315** program's racial classification is necessary to promote this interest. *In Re Griffiths*, 413 u.s., at 721-722, 93 s.ct., at 2854-2855.

V
A

It may be assumed that the reservation of a specified number of seats in each class for individuals from the preferred ethnic groups would contribute to the attainment of considerable ethnic diversity in the student body. But petitioner's argument that this is the only effective means of serving the interest of diversity is seriously flawed. In a most fundamental sense the argument misconceives the nature of the state interest that would justify consideration of race or ethnic background. It is not an interest in simple ethnic diversity, in which a specified percentage of the student body is in effect guaranteed to be members of selected ethnic groups, with the remaining percentage an undifferentiated aggregation of

students. The diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element. Petitioner's special admissions program, focused *solely* on ethnic diversity, would hinder rather than further attainment of genuine diversity. [FN50]

FN50. See Manning, *The Pursuit of Fairness in Admissions to Higher Education*, in *Carnegie Council on Policy Studies in Higher Education, Selective Admissions in Higher Education* 19, 57-59 (1977).

Nor would the state interest in genuine diversity be served by expanding petitioner's two-track system into a multitrack program with a prescribed number of seats set aside for each identifiable category of applicants. Indeed, it is inconceivable that a university would thus pursue the logic of petitioner's two-track program to the illogical end of insulating each category of applicants with certain desired qualifications from competition with all other applicants.

***316** [15] The experience of other university admissions programs, which take race into account in achieving the educational diversity valued by the First Amendment, demonstrates that the assignment of a fixed number of places to a minority group is not a necessary means toward that end. An illuminating example is found in the Harvard College program:

"In recent years Harvard College has expanded the concept of diversity to include students from disadvantaged economic, racial and ethnic groups. Harvard College now recruits not only Californians or Louisianans but also blacks and Chicanos and other minority students. . . .

"In practice, this new definition of diversity has meant that race has been a factor in some admission decisions. When the Committee on Admissions reviews the large middle group of applicants who are 'admissible' and deemed capable of doing good work in their courses, the race of an applicant may tip the balance in

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his favor just as geographic origin or a life spent on a farm may tip the balance in other candidates' cases. A farm boy from Idaho can bring something to Harvard College that a Bostonian cannot offer. Similarly, a black student can usually bring something that a white person cannot offer. [See Appendix hereto.] . . .

"In Harvard College admissions the Committee has not set target-quotas for **2762 the number of blacks, or of musicians, football players, physicists or Californians to be admitted in a given year. . . . But that awareness [of the necessity of including more than a token number of black students] does not mean that the Committee sets a minimum number of blacks or of people from west of the Mississippi who are to be admitted. It means only that in choosing among thousands of applicants who are not only 'admissible' academically but have other strong qualities, the Committee, with a number of criteria in mind, pays some attention to distribution among many *317 types and categories of students." App. to Brief for Columbia University, Harvard University, Stanford University, and the University of Pennsylvania, as *Amici Curiae* 2-3.

In such an admissions program, [FN51] race or ethnic background may be deemed a "plus" in a particular applicant's file, yet it does not insulate the individual from comparison with all other candidates for the available seats. The file of a particular black applicant may be examined for his potential contribution to diversity without the factor of race being decisive when compared, for example, with that of an applicant identified as an Italian-American if the latter is thought to exhibit qualities more likely to promote beneficial educational pluralism. Such qualities could include exceptional personal talents, unique work or service experience, leadership potential, maturity, demonstrated compassion, a history of overcoming disadvantage, ability to communicate with the poor, or other qualifications deemed important. In short, an admissions program operated in this way is flexible enough to consider all pertinent elements of

diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight. Indeed, the weight attributed to a *318 particular quality may vary from year to year depending upon the "mix" both of the student body and the applicants for the incoming class.

FN51. The admissions program at Princeton has been described in similar terms:

"While race is not in and of itself a consideration in determining basic qualifications, and while there are obviously significant differences in background and experience among applicants of every race, in some situations race can be helpful information in enabling the admission officer to understand more fully what a particular candidate has accomplished--and against what odds. Similarly, such factors as family circumstances and previous educational opportunities may be relevant, either in conjunction with race or ethnic background (with which they may be associated) or on their own." Bowen, *supra* n. 48, at 8-9.

For an illuminating discussion of such flexible admissions systems, see Manning, *supra* n. 50, at 57-59.

[16] This kind of program treats each applicant as an individual in the admissions process. The applicant who loses out on the last available seat to another candidate receiving a "plus" on the basis of ethnic background will not have been foreclosed from all consideration for that seat simply because he was not the right color or had the wrong surname. It would mean only that his combined qualifications, which may have included similar nonobjective factors, did not outweigh those of the other applicant. His qualifications would have been weighed fairly and competitively, and he would have no basis to complain of unequal treatment under the Fourteenth Amendment. [FN52]

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FN52. The denial to respondent of this right to individualized consideration without regard to his race is the principal evil of petitioner's special admissions program. Nowhere in the opinion of Mr. Justice BRENNAN, Mr. Justice WHITE, Mr. Justice MARSHALL, and Mr. Justice BLACKMUN is this denial even addressed.

It has been suggested that an admissions program which considers race only as one factor is simply a subtle and more sophisticated--but no less effective-- means of according racial preference than the Davis program. A facial intent to discriminate, however, is evident in petitioner's preference program and not denied in this case. No such facial infirmity exists in an admissions ***2763** program where race or ethnic background is simply one element--to be weighed fairly against other elements--in the selection process. "A boundary line," as Mr. Justice Frankfurter remarked in another connection, "is none the worse for being narrow." *McLeod v. Dilworth*, 322 U.S. 327, 329, 64 S.Ct. 1023, 1025, 88 L.Ed. 1304 (1944). And a court would not assume that a university, professing to employ a facially nondiscriminatory admissions policy, would operate it as a cover for the functional equivalent of a quota system. In short, good faith ***319** would be presumed in the absence of a showing to the contrary in the manner permitted by our cases. See e. g., *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977); *Washington v. Davis*, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976); *Swain v. Alabama*, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965). [FN53]

FN53. Universities, like the prosecutor in *Swain*, may make individualized decisions, in which ethnic background plays a part, under a presumption of legality and legitimate educational purpose. So long as the university proceeds on an individualized, case-by-case basis, there is no warrant for judicial interference in the academic process. If an applicant can establish that the institution does not adhere to a policy of individual

comparisons, or can show that a systematic exclusion of certain groups results, the presumption of legality might be overcome, creating the necessity of proving legitimate educational purpose.

There also are strong policy reasons that correspond to the constitutional distinction between petitioner's preference program and one that assures a measure of competition among all applicants. Petitioner's program will be viewed as inherently unfair by the public generally as well as by applicants for admission to state universities. Fairness in individual competition for opportunities, especially those provided by the State, is a widely cherished American ethic. Indeed, in a broader sense, an underlying assumption of the rule of law is the worthiness of a system of justice based on fairness to the individual. As Mr. Justice Frankfurter declared in another connection, "[j]ustice must satisfy the appearance of justice." *Offutt v. United States*, 348 U.S. 11, 14, 75 S.Ct. 11, 13, 99 L.Ed. 11 (1954).

B

In summary, it is evident that the Davis special admissions program involves the use of an explicit racial classification never before countenanced by this Court. It tells applicants who are not Negro, Asian, or Chicano that they are totally excluded from a specific percentage of the seats in an entering class. No matter how strong their qualifications, quantitative and extracurricular, including their own potential for contribution to educational diversity, they are never afforded the chance to compete with applicants from the preferred groups for the special admissions seats. At the same time, the preferred ***320** applicants have the opportunity to compete for every seat in the class.

The fatal flaw in petitioner's preferential program is its disregard of individual rights as guaranteed by the Fourteenth Amendment. *Shelley v. Kraemer*, 334 U.S., at 22, 68 S.Ct., at 846. Such rights are not absolute. But when a State's distribution of

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benefits or imposition of burdens hinges on ancestry or the color of a person's skin, that individual is entitled to a demonstration that the challenged classification is necessary to promote a substantial state interest. Petitioner has failed to carry this burden. For this reason, that portion of the California court's judgment holding petitioner's special admissions program invalid under the Fourteenth Amendment must be affirmed.

C

[17] In enjoining petitioner from ever considering the race of any applicant, however, the courts below failed to recognize that the State has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin. For this reason, so much of the California court's judgment as enjoins petitioner from any consideration of the race of any applicant must be reversed.

VI

[18][19] With respect to respondent's entitlement to an injunction directing his admission **2764 to the Medical School, petitioner has conceded that it could not carry its burden of proving that, but for the existence of its unlawful special admissions program, respondent still would not have been admitted. Hence, respondent is entitled to the injunction, and that portion of the judgment must be affirmed. [FN54]

FN54. There is no occasion for remanding the case to permit petitioner to reconstruct what might have happened if it had been operating the type of program described as legitimate in Part V, *supra*. Cf. *Mt. Healthy City Board of Ed. v. Doyle*, 429 U.S. 274, 284-287, 97 S.Ct. 568, 575-576, 50 L.Ed.2d 471 (1977). In *Mt. Healthy*, there was considerable doubt whether protected First Amendment activity had been the "but for" cause of Doyle's protested discharge. Here, in contrast, there is no question as to the sole reason for respondent's rejection--purposeful racial discrimination in the form of the

special admissions program. Having injured respondent solely on the basis of an unlawful classification, petitioner cannot now hypothesize that it might have employed lawful means of achieving the same result. See *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S., at 265-266, 97 S.Ct., at 563-564. No one can say how--or even if--petitioner would have operated its admissions process if it had known that legitimate alternatives were available. Nor is there a record revealing that legitimate alternative grounds for the decision existed, as there was in *Mt. Healthy*. In sum, a remand would result in fictitious recasting of past conduct.

*321 APPENDIX TO OPINION OF POWELL, J.

Harvard College Admissions Program [FN55]

FN55. This statement appears in the Appendix to the Brief for Columbia University, Harvard University, Stanford University, and the University of Pennsylvania, as *Amici Curiae*.

For the past 30 years Harvard College has received each year applications for admission that greatly exceed the number of places in the freshman class. The number of applicants who are deemed to be not "qualified" is comparatively small. The vast majority of applicants demonstrate through test scores, high school records and teachers' recommendations that they have the academic ability to do adequate work at Harvard, and perhaps to do it with distinction. Faced with the dilemma of choosing among a large number of "qualified" candidates, the Committee on Admissions could use the single criterion of scholarly excellence and attempt to determine who among the candidates were likely to perform best academically. But for the past 30 years the Committee on Admissions has never adopted this approach. The belief has been that if scholarly excellence were the sole or even predominant criterion, Harvard College would lose a great deal of its vitality and intellectual excellence

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and that the quality of the educational *322 experience offered to all students would suffer. Final Report of W. J. Bender, Chairman of the Admission and Scholarship Committee and Dean of Admissions and Financial Aid, pp. 20 *et seq.* (Cambridge, 1960). Consequently, after selecting those students whose intellectual potential will seem extraordinary to the faculty--perhaps 150 or so out of an entering class of over 1,100--the Committee seeks--

variety in making its choices. This has seemed important . . . in part because it adds a critical ingredient to the effectiveness of the educational experience [in Harvard College]. . . . *The effectiveness of our students' educational experience has seemed to the Committee to be affected as importantly by a wide variety of interests, talents, backgrounds and career goals as it is by a fine faculty and our libraries, laboratories and housing arrangements.* (Dean of Admissions Fred L. Glimp, Final Report to the Faculty of Arts and Sciences, 65 Official Register of Harvard University No. 25, 93, 104-105 (1968) (emphasis supplied).

The belief that diversity adds an essential ingredient to the educational process has long been a tenet of Harvard College admissions. Fifteen or twenty years ago, however, diversity meant students from California, New York, and Massachusetts; city dwellers and farm boys; violinists, painters and football players; biologists, historians and classicists; potential stockbrokers, academics and politicians. The result **2765 was that very few ethnic or racial minorities attended Harvard College. In recent years Harvard College has expanded the concept of diversity to include students from disadvantaged economic, racial and ethnic groups. Harvard College now recruits not only Californians or Louisianans but also blacks and Chicanos and other minority students. Contemporary conditions in the United States mean that if Harvard College is to continue to offer a first-rate education to its students, *323 minority representation in the undergraduate body cannot be ignored by the Committee on Admissions.

In practice, this new definition of diversity has meant that race has been a factor in some admission decisions. When the Committee on Admissions reviews the large middle group of applicants who are "admissible" and deemed capable of doing good work in their courses, the race of an applicant may tip the balance in his favor just as geographic origin or a life spent on a farm may tip the balance in other candidates' cases. A farm boy from Idaho can bring something to Harvard College that a Bostonian cannot offer. Similarly, a black student can usually bring something that a white person cannot offer. The quality of the educational experience of all the students in Harvard College depends in part on these differences in the background and outlook that students bring with them.

In Harvard College admissions the Committee has not set target-quotas for the number of blacks, or of musicians, football players, physicists or Californians to be admitted in a given year. At the same time the Committee is aware that if Harvard College is to provide a truly heterogen[e]ous environment that reflects the rich diversity of the United States, it cannot be provided without some attention to numbers. It would not make sense, for example, to have 10 or 20 students out of 1,100 whose homes are west of the Mississippi. Comparably, 10 or 20 black students could not begin to bring to their classmates and to each other the variety of points of view, backgrounds and experiences of blacks in the United States. Their small numbers might also create a sense of isolation among the black students themselves and thus make it more difficult for them to develop and achieve their potential. Consequently, when making its decisions, the Committee on Admissions is aware that there is some relationship between numbers and achieving the benefits to be derived from a diverse student body, and between numbers and providing a reasonable environment for those students admitted. But *324 that awareness does not mean that the Committee sets a minimum number of blacks or of people from west of the Mississippi who are to be admitted. It means only that in choosing among thousands of applicants who are not only "admissible" academically but have other

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strong qualities, the Committee, with a number of criteria in mind, pays some attention to distribution among many types and categories of students.

The further refinements sometimes required help to illustrate the kind of significance attached to race. The Admissions Committee, with only a few places left to fill, might find itself forced to choose between A, the child of a successful black physician in an academic community with promise of superior academic performance, and B, a black who grew up in an inner-city ghetto of semi-literate parents whose academic achievement was lower but who had demonstrated energy and leadership as well as an apparently abiding interest in black power. If a good number of black students much like A but few like B had already been admitted, the Committee might prefer B; and vice versa. If C, a white student with extraordinary artistic talent, were also seeking one of the remaining places, his unique quality might give him an edge over both A and B. Thus, the critical criteria are often individual qualities or experience not dependent upon race but sometimes associated with it.

Opinion of Mr. Justice BRENNAN, Mr. Justice WHITE, Mr. Justice MARSHALL, and Mr. Justice BLACKMUN, concurring in the judgment in part and dissenting in part.

[12] The Court today, in reversing in part the judgment of the Supreme Court of ****2766** California, affirms the constitutional power of Federal and State Governments to act affirmatively to achieve equal opportunity for all. The difficulty of the issue presented--whether government may use race-conscious programs to redress the continuing effects of past discrimination--***325** and the mature consideration which each of our Brethren has brought to it have resulted in many opinions, no single one speaking for the Court. But this should not and must not mask the central meaning of today's opinions: Government may take race into account when it acts not to demean or insult any racial group, but to remedy disadvantages cast on minorities by past racial prejudice, at least when appropriate findings have been made by

judicial, legislative, or administrative bodies with competence to act in this area.

THE CHIEF JUSTICE and our Brothers STEWART, REHNQUIST, and STEVENS, have concluded that Title VI of the Civil Rights Act of 1964, 78 Stat. 252, as amended, 42 U.S.C. § 2000d *et seq.*, prohibits programs such as that at the Davis Medical School. On this statutory theory alone, they would hold that respondent Allan Bakke's rights have been violated and that he must, therefore, be admitted to the Medical School. Our Brother POWELL, reaching the Constitution, concludes that, although race may be taken into account in university admissions, the particular special admissions program used by petitioner, which resulted in the exclusion of respondent Bakke, was not shown to be necessary to achieve petitioner's stated goals. Accordingly, these Members of the Court form a majority of five affirming the judgment of the Supreme Court of California insofar as it holds that respondent Bakke "is entitled to an order that he be admitted to the University." 18 Cal.3d 34, 64, 132 Cal.Rptr. 680, 700, 553 P.2d 1152, 1172 (1976).

[8][1][15] We agree with Mr. Justice POWELL that, as applied to the case before us, Title VI goes no further in prohibiting the use of race than the Equal Protection Clause of the Fourteenth Amendment itself. We also agree that the effect of the California Supreme Court's affirmance of the judgment of the Superior Court of California would be to prohibit the University from establishing in the future affirmative-action programs that take race into account. See *ante*, at 2738 n. **. Since we conclude that the affirmative admissions program at the Davis ***326** Medical School is constitutional, we would reverse the judgment below in all respects. Mr. Justice POWELL agrees that some uses of race in university admissions are permissible and, therefore, he joins with us to make five votes reversing the judgment below insofar as it prohibits the University from establishing race-conscious programs in the future. [FN1]

FN1. We also agree with Mr. Justice POWELL that a plan like the "Harvard"